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VOL 3799

No. 18482

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LUIS LEIVA CERVANTES,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Rules Page

Statutes

No. 18482

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LUIS LEIVA CERVANTES,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

I.

JURISDICTIONAL STATEMENT.

On November 21, 1962, appellant Luis Cervantes was indicted by a Federal Grand Jury for the Southern District of California. He was charged in nine counts with violation of Section 174, Title 21, United States Code (District Court Case No. 31642-(WM)-CD). Counts One, Three, Five and Seven charged that appellant knowingly and unlawfully sold specified quantities of heroin to a Special Employee of the Federal Bureau of Narcotics on September 27, October 4, October 16, and November 1, 1962, respectively, which, as he then and there well knew, had been imported into the United States of America contrary to law. Counts Two, Four, Six, Eight and Nine charged appellant with knowingly and unlawfully receiving, concealing and facilitating the concealment and transportation of specified quantities

of heroin on the same dates, Counts Eight and Nine relating to the November 1, 1962, transaction. [C. T. 2-10.][1]

Appellant was represented by counsel throughout the proceedings. A plea of not guilty was entered as to all counts, and, after jury waiver, trial by court was commenced on November 26, 1962. Appellant was found guilty as charged on Counts One through Eight on November 29, 1964. Count Nine had been dismissed previously on that date on motion of the Government. [C. T. 11.]

The Government thereafter filed an Information charging previous convictions and on November 29, 1964, appellant was sentenced to 20 years' imprisonment on each of Counts One through Eight, the sentences to commence and run concurrently. [C. T. 11 and 12.]

Appellant's motion for judgment of acquittal or, in the alternative, for a new trial was denied, the motion and order being filed December 12, 1962. [C. T. 13.] Notice of appeal was timely filed December 21, 1962. [C. T. 17.] The order of the United States District Court permitting appeal *in forma pauperis* was filed December 14, 1962. [C. T. 18.]

The jurisdiction of the District Court was based on Title 18, United States Code, Sections 174 and 3231. Jurisdiction of the Court of Appeals is conferred by Title 28, United States Code, Sections 1291 and 1294.

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[1]"C. T." refers to Clerk's Transcript of Record on Appeal.

II.
SPECIFICATIONS OF ERROR.

Appellant has failed to make specifications of error as required by the rules of this court. He makes certain contentions at page 3 of his Opening Brief claiming a variance between allegations in the indictment and the proof adduced during the trial. At page 4 of his brief appellant claims that statements made by him at and after the time of his arrest were unlawfully procured in view of the interrogating officers' failure to advise him of his right to counsel. He further contends that this evidence should not properly have been considered by the court. At the close of his argument, at page 8, appellant advances the position, apparently, that there was insufficient evidence upon which to base convictions on Counts 2, 4, 6, and 8 (receiving, concealing, and facilitating the concealment and transportation of heroin).

III.
RULES INVOLVED.

Rule 51, Federal Rules of Criminal Procedure, Title 18, United States Code, provides as follows:

> "Exceptions to rulings or orders of the court are unnecessary and for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and the grounds therefor; but if a party has no opportunity to object to a ruling or order, the absence of an objection does not thereafter prejudice him."

Rule 52, Federal Rules of Criminal Procedure, Title 18, United States Code, provides as follows:

> "(a) Harmless Error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.
>
> "(b) Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

IV.

STATEMENT OF FACTS.

During the latter part of September, 1962, three officers from the Lennox Sheriff's Station contacted Mrs. Wanda Krug at her apartment. A conversation ensued during which these officers informed Mrs. Krug that they wanted her to cooperate with them in an investigation of the narcotics activities of appellant. She agreed and it was arranged that she would appear at the Sheriff's Station the following day. Mrs. Krug met with these officers the next day as planned, at which time she agreed to make a purchase of heroin from the appellant. [R. T. 67-70.][2]

This was the initiation of a series of four transactions, arranged by Wanda Krug at the request of the Sheriff's Department, by which she purchased quantities of heroin from the appellant. At the trial, Mrs. Krug gave a detailed account of her activities. [*Cf.* R. T. 70-110.] Due to the fairly routine character of

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[2]"R. T." refers to Reporter's Transcript.

her participation in the first three transactions and the events leading up to appellant's arrest on November 1, 1962, her testimony is summarized below.

Prior to each of the first three transactions Wanda Krug telephoned appellant to arrange a meeting with him at his home. She was then thoroughly searched by Sheriff's officers and given county funds with which to make purchases of heroin from appellant. She then immediately proceeded to appellant's home and obtained heroin from him in exchange for the county funds. The heroin was subsequently transferred to Sheriff's deputies who took her to the Sheriff's Station where she was thoroughly searched. A detailed statement relating her participation was prepared immediately thereafter.

Mrs. Krug's testimony was amply corroborated by several Sheriff's Deputies who testified as to the following aspects of Mrs. Krug's participation in each of the four transactions. [*Cf.* R. T. 123-197.] Each transaction was discussed in advance with Mrs. Krug. She and her car were thoroughly searched prior to her proceeding to appellant's house. Surveillance was maintained over her prior to, and after her meeting with appellant. The heroin was received from Mrs. Krug immediately after her departure from appellant's house. She was again searched after being returned to the Sheriff's Station, and a statement recounting her activities was then prepared and signed by Mrs. Krug.

The events of the evening of November 1, 2962 — the night of the fourth transaction and appellant's arrest — are set out in detail below.

On the evening of November 1, 1962, Wanda Krug was provided $145.00 in county funds by Leo Berman, Deputy Sheriff. [R. T. 92, 133, 169, 182.] This money had been dusted with a fluorescent powder by Sheriff's Deputy Scholten. [R. T. 169 and 186.] Mrs. Krug had previously called appellant to arrange a meeting for that night. [R. T. 92.] After she and her car had been thoroughly searched by Sheriff's officers [R. T. 93, 132 and 163], a radio transmitter was attached to her person by Sheriff's Deputy Queen [R. T. 93, 132], and she proceeded to appellant's residence. [R. T. 94.]

Meanwhile, Sheriff's Deputies Scholten and Cox had proceeded to a location in the immediate vicinity of appellant's residence in a panel truck and were maintaining a vigil on a radio receiving device in conjunction with the transmitter attached to Mrs. Krug's person. [R. T. 182.] After Mrs. Krug was observed by Officer Scholten to enter appellant's house (about 7:00 P.M.), a conversation between Mrs. Krug and a male voice was heard intermittently over the receiver. [R. T. 183.] Officer Scholten related the conversation and subsequent events as follows [R. T. 183-186]:

> "A. The conversation was between Mrs. Krug and a male voice. The first part of this conversation had to do with the health of Mrs. Krug. Then the male voice questioned Mrs. Krug as to whether she had seen anything suspicious out in front of the house, and in particular mentioned an old truck parked across the street. The conversation went on. I overheard Mrs. Krug to say, 'I want two.'

The male voice replied, 'Two papers?'

She said, 'No, two quarters. I have $75 for one and $70 for the other.'

The male voice then said, 'Well, one will be short,' and indicated that she would have to wait a few minutes. . . ."

* * *

"Q. What happened then? A. I heard the same male voice which I had previously heard in conversation with Mrs. Krug state, 'This has only got five in it,' or something similar to that; and the conversation continued. The male voice said, 'It's tamped down in there, but it's all there,' or something on that order.

Then the male voice said, 'Here. Take this. You need it for the rent,' or something of that nature.

There was again the sound, the same as someone moving, and I next observed Mrs. Krug and the defendant Mr. Cervantes walking down the driveway on the east side of the residence at that location engaged in conversation.

Q. Mr. Scholten, later on that same evening did you have reason to go back to the defendant's house? A. I did.

Q. Did you have any type of equipment with you at that time? A. Yes, I did.

Q. What type of equipment did you have? A. That was a portable ultra-violate lamp.

Q. What did you do with this lamp, sir? A. I shone the lamp on the hands and clothing of all of the persons, except the police personnel, that were inside the house at that time.

Q. And what was the result? A. The defendant Mr. Cervantes' hands, and on his pants, next to his pocket, were the only ones that fluoresced in the particular shades of green and yellow fluorescence that I had used on the money.

Q. Did you hear Mr. Cervantes say anything at this time? A. Yes. I don't recall what it was, but I remember him saying something.

Mr. Roschko: No further question."

Appellant was placed under arrest by Officer Berman about 7:30 P.M., on November 1, 1962. At that time Officer Berman told appellant that he was under arrest for State and Federal Narcotic Laws and that anything he would say could be used against him. Approximately 20 minutes later, appellant was again told by Officer Berman that anything he said could be used against him, and appellant was shown two balloons containing a substance which Wanda Krug had delivered to Berman after leaving appellant's house. Appellant was asked what he did with the money Wanda had given to him, and he replied that he gave it to a negro named Leo shortly after Wanda left [R. T. 133, 176]; that he had obtained the two balloons he sold to Wanda from Leo, and that he had been buying heroin from Leo in quarter ounce quantities for approximately five months for his own use. [R. T. 194.] These remarks were reiterated by appellant to Officers Scholten, Austin, Cox, Berman, and Zane at the Lennox Sheriff's Station later that same evening. [R. T. 165-171; 178-180; 194, 195.]

V.

ARGUMENT.

A. Appellant Has Waived the Contentions Made on Appeal by His Failure to Make Timely Objections and Motions at Trial.

Prefatorily it is noted that appellant has failed to comply with Rule 18, Subdivision 2.(d) and (e) of the Rules of the United States Court of Appeals for the Ninth Circuit[3] in that he has not separately and particularly set out each error intended to be urged. Moreover, although appellant alleges error as to the admission of evidence of his statements to interrogating officers, he has not specifically quoted the grounds urged at the trial for the objection and the full substance of the evidence admitted, as required by the above mentioned rule. Furthermore, appellant's argument does not exhibit

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[3]Rule 18, Rules of the United States Court of Appeals for the Ninth Circuit, provides in pertinent part as follows:

> "2.(d) In all cases a specification of errors relied upon which shall be numbered and shall set out separately and particularly each error intended to be urged. When the error alleged is to the admission or rejection of evidence the specification shall quote the grounds urged at the trial for the objection and the full substance of the evidence admitted or rejected, and refer to the page number in the printed or typewritten transcript where the same may be found. When the error alleged is to the charge of the court, the specification shall set out the part referred to *totidem verbis,* whether it be in instructions given or in instructions refused, together with the grounds of the objections urged at the trial. In all cases, when findings are specified as error, the specification shall state as particularly as may be wherein the findings of fact and conclusions of law are alleged to be erroneous. . . .
>
> "2.(e) A concise argument of the case (preferably preceded by a summary), exhibiting a clear statement of the points of law or facts to be discussed, with a reference to the pages of record and the authorities relied upon in support of each point. . . ."

a clear statement of the points of law or facts to be discussed, with a reference to the pages of the record and the authorities relied upon in support of each point, as required by Rule 18, Subdivision 2.(e), *supra.*

It would have been sufficient, in conformity with Rule 51, *supra,* if appellant, at the time of trial, had made known to the court the action he desired to be taken or his objection to the action of the court and the grounds therefore.

However, in this case, no motion for a Bill of Particulars was made in advance of the trial. No motion to dismiss was made in the grounds of the alleged material variance between the allegations of the indictment and the proof introduced at trial. No objection was made to the testimony of arresting officers as to the statements made by the appellant at the time of his arrest. No motion to strike such testimony was made, and no motion for mistrial was made on the ground that such evidence was illegal and prejudicial.

Accordingly, it is submitted that appellant has waived the questions now propounded, and may not raise them for the first time on appeal.

> *Hill v. United States,* 261 F. 2d 483, 489 (9 Cir. 1958);
>
> *Fiano v. United States,* 271 F. 2d 883, 885, (9 Cir. 1959); cert. den. 361 U. S. 964 (1960); rehrg. den. 362 U. S. 925 (1960).

Although this court has discretion to review the record to determine whether or not any plain error or defect exists which affects the substantial rights of the appellant (Rule 52(b), Federal Rules of Criminal Procedure), it is submitted that the following argument shows that the record discloses no such plain error.

B. The Evidence Was Sufficient to Support Convictions as to the Concealment Counts.

At the outset it should be pointed out that appellant received concurrent sentences on all counts upon which he was convicted. Therefore, if it appears that the conviction is correct on any count, it is not necessary to review the judgments on the other counts. *Ybarra v. United States,* 330 F. 2d 44 (9 Cir. 1964), citing *Sinclair v. United States,* 279 U. S. 263 (1929).

In his attack upon the convictions as to the concealment counts (Counts 2, 4, 6, and 8) (Brief, pp. 7-8), appellant traces the alleged defect in the judgment to a variance between the allegations of the indictment and the proof introduced at trial. That variance related to the designation of the purchaser specified in Counts 1, 3, 5, and 7, charging sales of heroin. The indictment did not refer to any person other than the appellant in the concealment counts. It was only necessary to a finding of guilt as to such counts, that the appellant's possession of the heroin be established. The particular identity or status of the witness percipient to the fact of possession is wholly irrelevant to that issue.

Therefore, since the trial judge believed the overwhelming evidence establishing appellant's possession of heroin at the times alleged in the indictment, such possession was sufficient to authorize conviction, the appellant not having explained his possession to the satisfaction of the court. (*Cf.* Title 21, United States Code, Section 174; *Yee Hem v. United States,* 268 U.S. 178 (1925); *Agobian v. United States,* 323 F. 2d 693 (9 Cir. 1963), cert. den. 375 U.S. 985.)

The conviction must stand if supported by substantial evidence (*Buford v. United States,* 272 F. 2d 483 (9 Cir. 1960)), and on appeal, when considering an attack on the sufficiency of the evidence, the appellate court views the evidence at trial in the light most favorable to the Government, together with all reasonable inferences which may be drawn therefrom. *Glasser v. United States,* 415 U.S. 60 (1942); *Robinson v. United States,* 262 F. 2d 645 (9 Cir. 1959); *Stein v. United States,* 337 F. 2d 14 (9 Cir. 1964).

The evidence was clearly sufficient to support the convictions as to the concealment counts, independently of any incriminating admissions made by appellant with respect to the last transaction (Counts 7 and 8). It is submitted that the convictions as to Counts 2, 4, 6, and 8 are correct and should be affirmed, regardless of any question of error relating to the convictions on the remaining counts.

C. Appellant Has Pointed to No Error Resulting From the Admission in Evidence of Statements Made by Him to Arresting Officers.

Appellant contends that since he was not advised of his right to counsel by the arresting officers, his statements were illegally elicited in violation of the Sixth Amendment, and the conviction should be reversed. No authority has been offered to explain or support this claim, and the case does not present the class of factual situation contemplated by the United States Supreme Court in the cases of *Massiah v. United States,* 377 U.S. 201 (1964) and *Escobedo v. Illinois,* 378 U.S. 478 (1964).

The appellant had been informed by arresting officers that anything he said could be used against him. This warning was made at the time of arrest prior to the appellant's making any statements and again prior to questioning in appellant's backyard. There is no evidence of physical or psychological coercion, and the record discloses that the statements were made by appellant voluntarily.

Appellant had never requested counsel. He had never been denied access to counsel, and he was fully represented at trial after his plea of not guilty. There was no intervention between appellant and his counsel as in the cases of *Escobedo* and *Massiah, supra.* (See also *Queen v. United States,* 335 F. 2d 297, 298 (D.C. Cir. 1964)). Moreover, there was no denial of counsel at any critical stage where such deprivation resulted in the making of statements which later impelled the entry of a guilty plea, as in the case of *Wright v. Dickson,* 336 F. 2d 878 (9 Cir. 1964).

The trial court evidenced an acute awareness of the necessity for a showing that appellant had been advised of his right to remain silent as a prerequisite to the admissibility of any statement made by him. [R. T. 166-168.]

Although appellant urges that this evidence should not properly have been considered by the court, it is presumed on appeal that the trial court considered only competent evidence. *Alexander v. United States,* 241 F. 2d 351 (8 Cir. 1957). The court's rulings in admitting evidence cannot be urged as prejudicial if there is competent evidence to sustain the judgment. *Anderson v. Federal Cartridge Corporation,* 156 F. 2d 681 (8 Cir. 1946).

The testimony of Wanda Krug alone was adequate to support the conviction. In addition, her testimony was fully corroborated. No showing has been made that the introduction of appellant's statements in the Government's case in chief was prejudicial. Furthermore, there is no indication that appellant's defense was hampered, or in any way adversely affected by the admission of his statements to interrogating officers.

Finally, it is important to note that appellant's statements to the Sheriff's deputies were material only to the November 1st transaction (Counts 7 and 8). Nothing in appellant's admissions can be construed to implicate him in the offenses charged in the preceding six counts of the indictment. Therefore, the illegality, if any, which appellant claims attached to this evidence, is wholly unrelated to the validity of the convictions as to the preceding six counts.

D. The Alleged Variance Between the Allegations of the Indictment and the Proof Adduced at Trial Was Not Material and Did Not Affect the Substantial Rights of Appellant.

The appellant does not now, nor did he originally attack the sufficiency of the indictment.

The classical rule with respect to the sufficiency of an indictment is set forth in the case of *United States v. Dubrow,* 346 U.S. 374, 376 (1953) which states:

> " 'The true test of the sufficiency of an indictment is not whether it could have been made more definite and certain, but whether it contains the elements of the offense intended to be charged, "and sufficiently apprises the defendant of what he must be prepared to meet, and, in case any other pro-

> ceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction.". . .' . . ."

In the case of *Rivera v. United States,* 318 F. 2d 606 (9 Cir. 1963), appellant contended that the indictment did not meet Sixth Amendment standards because it failed to allege the name of the person to whom he sold marijuana. The court held that that detail was not an element of the offense stated under 21 U.S.C.A. Section 176a. The court said at page 607 that:

> "The indictment alleged the offense substantially in the words of the statute, which sets forth all the essential elements of the crime; in addition, the time and place of sale were specified, as was the amount of marijuana sold. The indictment thus alleged an offense, and identified the particular conduct upon which the charge was based to the extent necessary to protect appellant from double jeopardy and to tell him what he must be prepared to meet. This was enough to satisfy constitutional standards; an indictment in the form of this one would not be vulnerable to attack even on direct appeal from judgment of conviction. (Citing *Debrow, supra,* and other cases.)"

See also *Robison v. United States,* 329 F. 2d 156 (9 Cir. 1964) applying *Rivera, supra,* to 21 U.S.C. 174; and *Taylor v. United States,* 224 F. Supp. 82 (W. D.) Mo. 1963.

If the evidence introduced by the government conforms in all material respects to a sufficient indictment, the appellant cannot complain that he has been

misled or exposed to subsequent prosecution. *Berger v. United States,* 295 U.S. 78, 82 (1935).

It is submitted that the designation of the status of the individual to whom appellant was charged with selling narcotics was an insignificant factor in the preparation of his defense. If it were necessary for appellant to determine the identity of the purchaser, it would have been appropriate for him to move for the filing of a Bill of Particulars. No such motion was made. The fact that Wanda Krug was associated with local law enforcement officers, and not the Federal Government, as specified in the indictment, could not materially have affected appellant's tactical position at trial, unless he discovered that he had sold a like quantity of heroin the same day to a special employee of the Federal Government. Appellant's argument negatives this possibility. (See Appellant's Brief, p. 5.)

Appellant relies solely on *United States v. Raysor,* 294 F. 2d 563 (3 Cir. 1961). In that case, appellants were charged with selling narcotics to George Dilworth, a Narcotics Agent, while the evidence at trial established sales to one Thomas Charity. Charity was a decoy, buying for Dilworth with money provided by Dilworth. The government contended that the sale to an agent was equivalent to a sale to the principal, and argued that the variance was therefore not material. It was held that the appellants would not be protected from another prosecution for the sale of heroin to Charity should the conviction for making a sale to Dilworth be permitted to stand.

It is submitted that the *Raysor* decision is incorrect, but that conclusion is not necessary to the rejection

of *Raysor* as an applicable authority, since it is obviously distinguishable on its facts. In that case, the indictment personally identified the individual to whom Raysor allegedly sold narcotics. No such personal identification exists in the indictment in the present case, and appellant found himself confronted with the same situation as that created by an indictment which does not specify the identity of the other party to the transaction.

In *Ferrari v. United States,* 169 F. 2d 353 (9 Cir. 1948) the indictment charged appellant with having received heroin from one Bruno. The proof established one Flier to have been the person with whom appellant associated in the illegal use of heroin.

The court held that appellant was informed of the nature of the charge and so was enabled to present his defense, was not taken by surprise, and is protected against another prosecution for the same offense.

The government's evidence showed that appellant was in the back room of a certain bar in San Francisco with Flier. Defendant's evidence was that he was in Palm Springs at that time. Furthermore, both Bruno and Flier testified for appellant.

At page 354 the court stated the following:

> "Appellant testified that he was in Palm Springs on the evening of the 5th of January, 1946, and therefore could not have been present in the rear liquor rooms of the Stardust Bar in San Francisco, California, as the testimony of witnesses for the government indicated. It was not prejudicial to the presentation of such a defense that the man alleged to have accompanied appellant to the room

> in the rear of the Stardust Bar on the said date was incorrectly named in the indictment. *The important allegations were those relating to time, place and acts.* . . . In the light of this situation it is difficult to understand in what manner appellant could have been in a better position to present all the defenses he may have had merely by the substitution of Flier for Bruno in the indictment. Count One of the indictment was not a conspiracy count. The conspiracy charge contained in Count Fifty-six was dismissed, and no charge of a sale between appellant and another person was made. Hence, the facts presented in support of the charge in Count One were of such a nature as to make it apparent appellant could not be prosecuted again for the same offense. *An examination of the entire record convinces us that the technical error complained of did not affect the substantial rights of appellant and, hence, should be disregarded.* Federal Rules of Criminal Procedure Rule 52(a), 18 U.S.C.A. following section 687." (Emphasis added.)

The view taken by this Circuit in the *Ferrari* case, *supra,* is dispositive of appellant's argument. Appellant could not be exposed to the danger of a second prosecution under the same statute for his participation in the transactions proven in the trial. Regardless of the designation applied to Wanda Krug in a subsequent indictment, presumably the same facts would be introduced at a subsequent trial, and appellant would obviously be placed in jeopardy a second time. He is expressly protected from this eventuality by the Constitution, and the charges would be dismissed.

VI.
CONCLUSION.

It is respectfully submitted that appellant has specified no defect or error at the trial which warrants reversal of the conviction. The alleged variance with respect to counts 1, 3, 5, and 7 was not material and did not prejudice appellant. The argument that appellant was deprived of his right to counsel is lacking in merit in view of the factual circumstances surrounding his admissions to interrogating officers. In any event, the argument that appellant was deprived of counsel relates to counts 7 and 8 only, and has no applicability to the remaining counts of the indictment. The evidence presented at trial was independently sufficient to support the convictions as to counts 2, 4, 6, and 8, and since the sentences imposed were ordered to run concurrently, it is not necessary to review the correctness of the judgments as to the other counts.

The judgment of the trial court should be affirmed.

Respectfully submitted,

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Certificate.

I certify that in connection with the preparation of this brief I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that in my opinion the foregoing brief is in full compliance with those rules.

WARREN P. REESE

Nos. 18,499 and 18,500

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

B. B. MARGOLIS AND IRIS M. MARGOLIS,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR REHEARING.

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Nos. 18,499 and 18,500

IN THE

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FOR THE NINTH CIRCUIT

B. B. MARGOLIS AND IRIS M. MARGOLIS,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR REHEARING.

To the Honorable Stanley N. Barnes, Charles M. Merrill, and Ben. Cushing Duniway, Circuit Judges of the United States Court of Appeals for the Ninth Circuit:

Pursuant to the Court's Rule 23, the petitioners, by their counsel, petition for a rehearing. The Court's opinion and judgment were filed and entered September 11, 1964.

The grounds for the petition are:

1. The Court has not decided a material issue duly presented to it by petitioners, and which the respondent did not dispute. That is, on pages 100-101 of their Opening Brief, the petitioners developed the point, based on the respondent's own regulation (Section 1.1031(a)-1(a)) that if any property transferred in an exchange meets the requirements of Section 1031, then *all* properties transferred in the exchange are covered by the

statutory non-recognition of gain provisions. Yet the Court's opinion [see, for example, the first paragraph on page 7 of the slip opinion] erroneously restricts the non-recognition of gain in the Sachs and Levikow exchanges to "commercial" properties transferred, ignoring the "residential" lots transferred (an aggregate of 4 out of the 11 lots involved). It is submitted that the entire gain on the Sachs and Levikow exchanges is entitled to non-recognition.

2. The Court has not covered one material aspect of the Tracts 473 and 482 matter (Kearney Park notes and land sale). Under the June 15, 1956 contract referred to in the Court's opinion, the two trusts (and the petitioners, to the extent of their interests therein) were entitled to be reimbursed for advances made to pay bonds and taxes on Kearney Park land. Petitioners share of these advances was $13,230.50, and it seems obvious that petitioners cannot be held to have realized income to the extent the sums received by petitioners from Sutherland are attributable to a reimbursement of the cash advances made by them. The Court is requested to state this explicitly to avoid confusion on remand.

3. The Court's opinion specifically recognizes that petitioners held and regarded commercial and industrial property as investment property *not* held primarily for sale to customers in the ordinary course of trade or business [pages 6-7 of the slip opinion]. *All* of the property involved in the Trusts 473 and 482 issues (Kearney Park notes and land) was zoned as commercial and industrial property [stipulation par. 107; Record p. 78]; and it is undisputed that the extension of the Navy flight pattern effectively prevented residential use of the land [Tax Court Findings, Record p. 129]. If, as

the Court held, the trusts may be disregarded [Slip opinion, p. 14] then petitioners must be regarded as holding an equity interest in *investment* property, since the Court recognized that petitioners had never been in the business of selling commercial or industrial properties; consequently any gain realized was properly reported as capital gain, and the Court should so hold.

For the reasons stated, the granting of this petition for rehearing is justified.

Respectfully submitted,

HARRISON HARKINS,

Counsel for Petitioners.

Certificate.

The within Petition for Rehearing is well founded, not interposed for delay, and is made in a good faith attempt to expedite the disposition of the case on remand.

HARRISON HARKINS,
Counsel for Petitioners.

No. 18505 and 18776

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 18505

UNITED STATES OF AMERICA,

Appellant,

vs

MONOLITH PORTLAND MIDWEST COMPANY,

Appellee,

No. 18776

MONOLITH PORTLAND CEMENT COMPANY

Appellant,

vs.

R. A. RIDDELL, District Director of Internal Revenue, Los Angeles District,

Appellee.

Taxpayers' Petition for Rehearing and Suggestion That Rehearing Be Before the Court Sitting En Banc.

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TABLE OF AUTHORITIES CITED

No. 18505 and 18776

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 18505

UNITED STATES OF AMERICA,

Appellant,

vs

MONOLITH PORTLAND MIDWEST COMPANY,

Appellee,

No. 18776

MONOLITH PORTLAND CEMENT COMPANY

Appellant,

vs.

R. A. RIDDELL, District Director of Internal Revenue. Los Angeles District,

Appellee.

Taxpayers' Petition for Rehearing and Suggestion That Rehearing Be Before the Court Sitting En Banc.

To the Honorable Stanley N. Barnes and Gilbert H. Jertberg, Circuit Judges; and Ray McNichols, District Judge:

Taxpayers respectfully request the Court to grant a rehearing and suggest that the rehearing be *en banc.*

This Court has construed the Supreme Court's summary discussion and determination of the single certiorari question presented in *Riddell v. Monolith Portland Cement Company,* 371 U. S. 537, reh. den. 372 U. S. 832, and its general, unqualified reversal "for disposition in accordance with this opinion", as automatically and *sub silentio* foreclosing Monolith's vital

right to be heard and to present evidence on the remand on all the other questions in the case.*

We submit that such revolutionary contraction by implication of the traditional right on remand to a full, fair hearing on issues not reached by the Supreme Court, so transcends the issues of this particular case as to merit reconsideration by the entire Court. In support thereof, we submit the following:

1. Many important questions in issue in the original district court proceeding were never decided. One of these questions was whether, even if Monolith's limestone were found to be customarily sold in crude, crushed form, Monolith's conventional sintering process** was an allowable "mining" process, as the statute expressly and specifically commanded. §114(b)(4)(B)(iii).*** Since the District court found that Monolith's

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*No hearing of any kind was ever held in the district court following the remand. Instead, by minute order, the district court spread the Supreme Court's mandate, and calling for new findings, conclusions and judgment [R. 746], rejected those proposed by Monolith [R. 803] and accepted the Government's [R. 828], after interlineating the notation that such procedure was required by the mandate [Clk. Tr. pp. 704, 706]. In the constitutional sense, *Akron C. & Y. R. Co. v. United States,* 261 U.S. 184, 200, Monolith has thus yet to be heard.

**"The process of burning and sintering or calcining of the calcium carbonate rock . . . in the rotary kiln." *California Portland Cement Co. v. Riddell,* 3 AFTR 2d 438, 442, S.D. Cal. 1958. Although reversed on another point, this Court acknowledged the potential issue, *Riddell v. California Portland Cement Co.,* 297 F. 2d 345, 354, in response to Monolith's *amicus curiae* brief, stating: ". . . Thus, if calcium carbonate falls within (iii), then sorting, concentrating, sintering and loading for shipment are proper items to be included if any such treatment has taken place."

***"The term 'mining' as used herein shall be considered to include not merely the extraction of the minerals from the ground but also the ordinary treatment processes . . . The term 'ordinary treatment processes,' as used herein, *shall include* . . . (iii) in the case of . . . minerals which are customarily sold in the form of a crude mineral product—sorting, concentrating, and *sintering* . . ." (Italics added)

limestone was not marketable in crude [crushed] form (i.e., prior to finished cement) [R. 171-172], it did not reach the contingent question of allowable "mining" processes for clause (iii) minerals. Neither did this Court, since it accepted the non-marketability finding; *R A. Riddell v. Monolith Portland Cement Company,* 301 F. 2d 488, 494-95, 9 Cir. 1962.

The Supreme Court found (contrary to the courts below) that Monolith's limestone was a clause (iii) mineral—one customarily sold in the form of a crude [crushed] mineral product—and hence "controlled by Cannelton" (371 U. S. 537, 538). However, while in *Cannelton,* the clause (iii) findings were dispositive, since the taxpayer neither used nor claimed the processes specified by § 114(b)(4)(B)(iii); the Supreme Court's clause (iii) finding in *Monolith* automatically reactivated the contingent "sintering" issue, as to which Monolith then became entitled to a hearing.

However, on remand, the district court dismissed Monolith's complaint without ever affording Monolith a hearing and an opportunity to present evidence on or urge additional available issues (such as "sintering"), not within the compass of the mandate *Sprague v. Ticonic Nat. Bank,* 307 U. S. 161, 167.*

In its primary sense, due process requires a hearing before judgment. The maxim "audi alteram partem" —hear the other side—is a constitutional command. This Court is not at liberty to grant or withhold due

*Naturally, error was assigned [R. 846-847], and urged in the briefs (*e.g.,* Opening Brief, pp. 30-31, 41). The issues not considered by the Supreme Court, as to which Monolith claims lack of hearing constituting denial of due process, fall into three classes: (1) issues not yet decided by *any* court (such as "sintering"); (2) issues decided by the district court but passed by this Court (*res judicata*); (3) issues which formed this Court's alternative bases for decision (non-retroactivity, "existing law").

process, which the Constitution commands for all, merely in accordance with its view of the merits. *Eubanks v. Louisiana,* 356 U. S. 584, 589. The summary procedure by which (after the case had been summarily decided upon an entirely new ground in the Supreme Court), Monolith was denied an opportunity on the remand to present evidence upon or urge other important issues not before the Supreme Court (such as "sintering"), violates the due process guaranteed to all by the Fifth Amendment to the Constitution, which includes a meaningful hearing prior to judgment on remand, *Saunders v. Shaw,* 244 U. S. 317, 319; *Morgan v. United States,* 304 U. S. 1, 19; *Akron C. & Y. R. Co. v. United States,* 261 U. S. 184, 200.

2. This Court has decided the important question of the legal scope of a summary *per curiam* opinion of reversal by the Supreme Court in conflict with decisions of the Supreme Court,* and contrary to the Supreme Court's certiorari jurisdiction and published rules

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*Based on the venerable principle that "no inference can be drawn from silence when there is no duty to speak", *United States v. Commissioner of Immigration,* 273 U. S. 103, 112, "A judgment of reversal by an appellate court is not necessarily an adjudication of any other than the questions in terms discussed and decided." *Mutual Life Insurance Co. v. Hill,* 193 U. S. 551. "Questions which merely lurk in the record" are not foreclosed by a general reversal, *KVOS v. Associated Press,* 299 U. S. 269, 279; *Charles Wolff Packing Company v. Court of Industrial Relations,* 267 U. S. 552, 562; *Communist Party of U. S. v. Subversive Act. Con. Board,* 254 F. 2d 314, 321-322, C. A. D. C. 1958. A decision of the Supreme Court is authority only for questions which *were* decided, *Cohens v. Virginia,* 6 Wheat. 264; it does not foreclose questions which *might* have been decided. "Certainly omissions do not constitute a part of and become the law of the case, nor does a contention of counsel not responded to." *Hartford Life Ins. Co. v. Blincoe,* 255 U. S. 129, 136. Instead, alleged questions not dealt with in the Court's opinion remain for consideration below upon a reversal and remand. *Cities Service Oil Co. v. Dunlap,* 308 U. S. 208, 211-213.

of practice and procedure,* thus depriving Monolith of due process.** The answers to questions the Supreme Court has avoided deciding in advance of necessity by the *per curiam* device may not be supplied by the lower courts by interpretative implication.

Respectfully submitted,

JOSEPH T. ENRIGHT,
NORMAN ELLIOTT,
BILL B. BETZ,
Attorneys for Monolith Portland Cement Cement Company and Monolith Portland Midwest Company.

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*By the Judges Act of 1925 (43 Stat. 936), the "right" to appeal federal civil cases to the Supreme Court (and the Court's correlative "duty" to hear and decide them) was abolished, and plenary, discretionary certiorari jurisdiction was conferred upon the Court in its place. Thus, while the Supreme Court has the *power* to correct *any* error below, 28 USC §2106, there is no correlative duty to do so, and the fact that the Court has the power (jurisdiction) will thus not support the inference that the power has been exercised, *Williams v. Georgia,* 349 U. S. 375, 389. It is true that on certiorari the respondent may urge issues in controversy in the Court of Appeals, *United States v. Carignan,* 342 U. S. 36, 38; and the Supreme Court *may* decide that the judgment should be affirmed on such alternative grounds, *United States v. Curtiss-Wright Export Corp.,* 299 U. S. 304, 330. However, while under Rule 24(1), Revised Rules of the Supreme Court), failure to urge such a ground may automatically preclude the Court's consideration thereof, *Weiner v. United States,* 357 U. S. 349, 351, the Supreme Court is under no compulsion to decide, any such additional issues. On the contrary, the Court "confines itself to the ground upon which the writ was asked or granted", *Helis v. Ward,* 308 U. S. 365, 370. Issues considered by the Court are "fixed by the petition", *Irvine v. California,* 347 U. S. 128, 129. Indeed, the Court has recently held that where an additional issue is brought to the Court's attention by the respondent, "under our rules it is not before us." *Namet v. United States,* 373 U. S. 179, 190.

**Since the Supreme Court is the Nation's law-maker in this area of federal appellate procedure, due process requires that traditional forms of fair procedure must not be restricted by implication or the most explicit action by the Supreme Court. *Greene v. McElroy,* 360 U. S. 474, 508.

Certificate of Counsel.

The undersigned, one of the attorneys for the petitioners, states that in his judgment this petition is well-founded and is not interposed for purposes of delay.

NORMAN ELLIOTT

Swales Vol. 3737

Nos. 18510 to 18533, 18866 to 18872

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED AIR LINES, INC.,

Appellant,

vs.

JANICE WIENER *et al.* (24 cases); CATHERINE B. NOLLENBERGER *et al.* (7 cases); UNITED STATES OF AMERICA (31 cases),

Appellees.

PETITION FOR REHEARING.

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Nos. 18510 to 18533, 18866 to 18872

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED AIR LINES, INC.,

Appellant,

vs.

JANICE WIENER *et al.* (24 cases); CATHERINE B. NOLLENBERGER *et al.* (7 cases); UNITED STATES OF AMERICA (31 cases),

Appellees.

PETITION FOR REHEARING.

To the Honorable, Walter L. Pope, Circuit Judge, Frederick G. Hamley, Circuit Judge, Gilbert H. Jertberg, Circuit Judge:

The United States, by its attorneys, respectfully petitions the court for a rehearing on that portion of the decision and judgment of this court entered on June 24, 1964, requiring the United States to pay indemnity to United Air Lines to the full extent of the judgments in the nongovernment employee cases;[1] and requests that this issue be reheard before the court sitting *en banc*.

1. The issue of indemnity is especially appropriate for a rehearing *en banc*. As the opinion expressly recognized, although the issue of indemnity is governed

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[1]Although this petition pertains only to that issue, the government of course reserves the right to seek review of all adverse portions of that decision.

by the law of Nevada, that State has neither statutory nor case law on the subject (Slip Opinion, p. 25). By placing its decision on its view of the common law prevailing in the majority of American jurisdictions, therefore, the opinion in effect laid down principles which, if allowed to stand, will govern the court's decisions for all future tort cases, except in the comparatively unusual situations where there is state authority directly in point.

The substance of the panel's decision is that one joint tortfeasor may recover full indemnity against another, although neither is grossly negligent and both are guilty of active negligence, if one is more negligent than the other. The novelty and importance of the decision in this regard is underscored by the fact that, apart from the panel decision, there is absolutely no similar holding in collision cases, such as this one, where both parties are actively negligent.

Although the opinion expressly acknowledges that the common law will not, in the absence of contract, impose indemnity on one of two concurrently negligent wrongdoers, except where "their negligence is substantially different not merely in degree but in character" (Slip Opinion, pp. 29-30),[2] the panel awarded full indemnity to United on the ground that the government was more negligent than was United (*Id.*, pp. 31-32). The findings of the district court, affirmed by the panel on appeal, reflect that each crew was guilty of active negligence of the same character (*i.e.*, in failing to see and avoid the other airplane, *Id.*, p. 11; Find. 73), and that both United and the government were guilty of the same kind of active pre-flight negli-

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[2]For cases so holding, see, *e.g.*, *Union Stock Yards Co. v. Chicago B. & Q. R. Co.*, 1905, 196 U.S. 217, 224-226; *United States v. Acord*, 10 Cir. 1954, 209 F. 2d 709, 714-716 *cert. denied*, 347 U. S. 975.

gence, that is, sending their airplanes into an area which they knew might be dangerous because of the presence of other airplanes, without taking adequate precautionary measures (see, *Id.*, pp. 11-12). By imposing liability for the accident wholly upon one party in such circumstances, the panel has imported the doctrine of comparative negligence into the law of indemnity, a doctrine which is wholly foreign to the common law principles it purported to apply.[3] In so doing it has opened the door to the imposition of full indemnity in a whole host of vehicle collision cases in which indemnity has previously been denied.

2. In *Booth-Kelly Lumber Co. v. Southern Pacific Co.*, 1950, 183 F. 2d 902, this court recognized and applied the common law principle, set forth in Restatement, Restitution, §§ 95, 102, that one who has actual knowledge of a dangerous condition and does not act reasonably to remedy it, cannot recover indemnity from the person creating that dangerous condition. Yet the panel here awarded full indemnity to United, although sustaining the findings of the district court that United had actual knowledge of the "hazardous conditions," and two "near-misses" in the area of the collision, but continued to send its airplanes there without taking any precautionary crew training measures to lessen the risk (Slip Opinion, pp. 11-12). We submit that a rehearing *en banc* is necessary to reconcile the decision of the panel with the principles adopted in *Booth-Kelly Lumber Co., supra.*

3. Even if, contrary to our views, indemnity could properly be awarded on the basis of comparative degrees of negligence, the panel erred in weighing all of the government's acts of negligence, against only the negligence of the United crew in failing to see and avoid

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[3]See, *United States v. Acord, supra,* 209 F. 2d at 715; *Builders Supply Co. v. McCabe,* 1951, 366 Pa. 322, 77 A. 2d 368, 370.

the Air Force airplane (Slip Opinion, pp. 31-32). Although the opinion affirms that "United had knowledge" of the dangerous conditions in the Victor 8 airway near Las Vegas (*Id.,* pp. 11-12), and sent its airplanes there without taking any precautionary crew training measures, the opinion ignores these critical facts in weighing the comparative degree of fault (*Id.,* pp. 31-32). Rehearing is necessary to reconcile this internal inconsistency. Consideration of all of United's negligence suggests that the district court's finding that the parties were *in pari delicto* was not "clearly erroneous" as the panel ruled, but clearly correct.[4]

4. The panel relied in large part in its weighing of relative fault upon its belief that the Air Force pilot had in fact an opportunity to avoid the collision, but failed to do so (*Id.,* p. 31). Not only is that belief contrary to the facts, and the findings of the district court (particularly No. 73), but United never urged the issue in the district court, and did not raise it in this court until its reply brief. Yet in direct conflict with this court's recent ruling in *First Federal Savings & Loan Assn. v. United States,* 1961, 295 F. 2d 481, 482-483, the panel here has reversed the district court in large part on a factual issue which was "never framed for consideration by that court."

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[4]The opinion relies upon the fact that United's negligence consisted of a breach by United of a duty to exercise "the highest degree of care" (*Id.,* p. 31); but ignores the findings of the district court which it affirmed, that United violated not only that duty, but the duty to exercise ordinary care. *E.g.,* Finding 73, *"the crews in the exercise of ordinary care,* could and should have seen and taken the action necessary to avoid the collision" (emphasis added).

Conclusion.

For the foregoing reasons, it is respectfully submitted that this petition should be granted.

FRANCIS C. WHELAN,
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DONALD A. FAREED,
Assistant U. S. Attorney,
Chief of Civil Section,

DONALD J. MERRIMAN,
Assistant U. S. Attorney,

Attorneys for Appellee,
United States of America,

Certificate.

I certify that in my judgment this petition for rehearing is well founded and is not interposed for delay.

DONALD J. MERRIMAN
Assistant U. S. Attorney

Nos. 18510 to 18533, inclusive, and 18866 to 18872, inclusive.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED AIR LINES, INC.,

Appellant,

vs.

JANICE WIENER, *et al.,* and CATHERINE B. NOLLENBERGER, *et al.,* (excluding FAITH C. PARIS, *et al*).,

Appellees.

UNITED STATES OF AMERICA,

Appellant,

vs.

JANICE WIENER, *et al.,*

Appellees,

PETITION FOR REHEARING.

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Nos. 18510 to 18533, inclusive, and 18866 to 18872, inclusive.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED AIR LINES, INC.,

Appellant,

vs.

JANICE WIENER, *et al.*, and CATHERINE B. NOLLENBERGER, *et al.*, (excluding FAITH C. PARIS, *et al*).,

Appellees.

UNITED STATES OF AMERICA,

Appellant,

vs.

JANICE WIENER, *et al.*,

Appellees,

PETITION FOR REHEARING.

This Petition for Rehearing is limited to that portion of the Court's opinion appearing under the heading "INCREASE OF JURY'S DAMAGE AWARDS" [Slip Opinion, pp. 36-43], relating to the Matlock and Nollenberger cases.

The opinion of the Court on this point states:

> "The jury was admonished to award damages in accordance with all the instructions of the court. No party specifies as error the giving of any of the instructions set forth in the margin.

> "We will not speculate as to the weight, if any, accorded by the jury to one or more of the italicized factors appearing in such instructions. Suffice it to say that the answers to the eleven special interrogatories do not exhaust all of the factors of damage included within the instructions, and therefore no square conflict exists between the answers and the general verdict. *We are not called upon to consider either whether the jury should not have been permitted to consider one or more of the italicized factors . . .*" [Slip Opinion, pp. 41-43.] (Emphasis added.)

The giving of a general instruction which embraces general principles, some of which may not be applicable to the evidence in the case is not necessarily either error or prejudicial. A jury cannot properly apply a principal of law unless there is evidence in the record to which the principle applies.

In this case the Court has held that the instructions given with respect to damages include matters which go beyond the bounds of the special interrogatories and that, therefore, the special interrogatories do not afford a sufficient basis for mathematically computing the total damages from the special findings.

If, however, as appellees contend, there was no evidence relating to any matters which the jury properly could have considered in determining damages other than those embraced within the interrogatories, then a computation based upon the answers to the special interrogatories would cover all of the matters to which the evidence relates and would not be erroneous. A rehearing should be granted to consider whether or

not there was any evidence to support any element in the computation of damages not in fact included within the special interrogatories.

Respectfully submitted,

JOHNSON & LADENBERGER,
MARGOLIS & MCTERNAN,

By BEN MARGOLIS,

Attorneys for Appellees Matlock and Nollenberger.

Certificate.

BEN MARGOLIS, one of the attorneys of record for appellees herein, herewith certifies that this Petition for Rehearing is in his judgment well founded and is not interposed for delay.

BEN MARGOLIS

Supreme Court Vol. 3239

NO. 18562

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HELEN HERRERO PEREZ,

Appellant,

vs.

THE ESTATE OF VICENTE PANGELINAN HERRERO, et al.,

Appellees.

PETITION FOR REHEARING

The Appellant above named respectfully petitions this Honorable Court for a rehearing of the appeal in the above-captioned cause or a clarification of the opinion and, in support of this petition represents to the court as follows:

Appellant fully agrees with the law as found by this court particularly with the holding as to the rule that a court must take judicial notice of the prior law.

Appellant believes, however, that the court has misconstrued the record in this case and the relief sought.

It is appellant's belief that such determination and application is the function and duty of the lower court.

Basically the relief sought here by appellant is that the court below must take judicial knowledge of the former laws, as this court did state; that, as we believe is conceded by all

rights vested under a former law cannot be divested by a subsequent enactment and an opportunity for the lower court to determine and apply such law when found, to the facts of the instant case.

The record discloses the great confusion of terms, the discussion of foreign law, not the law of the jurisdiction as it formerly existed and the insistence that the former law must be proven by the rules for proving a foreign law. In this confusion and fog of terms no opportunity ever appeared or was given to refresh the courts knowledge by means of the only method available, the records of the cases in the District Court of Guam.

One cannot prove the law of Guam by means of certified and authenticated copies of the law of the Kingdom of Spain.

It may have escaped notice that the District Court of Guam clearly recognized the holding in Calvo v. Martinez 6-55 in that Court since it discussed that case in the opinion of 26 December 1962. Presumably it had the case file before it.

Appellant submits that the District Court of Guam was aware of the former laws of Guam and should have determined the question of vested rights under that law.

Appellant believes that the lower court erroneously considered the question as purely a matter of probate law and did not discuss the constitutional question sought to be presented to it. If such rights existed and were vested by

former law they were not part of the estate and could not be disposed of in the probate proceedings.

Appellant submits that from the record in this proceeding and the evident confusion in the courts below that the findings of this court should be modified to permit and direct the lower court to find and determine the former law of Guam and to determine what, if any, rights were thereby vested.

For the foregoing reasons, this petition for rehearing should be granted.

s/ Finton J. Phelan, Jr.
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UNINCORPORATED TERRITORY OF GUAM)
) ss.
CITY OF AGANA)

Finton J. Phelan, Jr., being first duly sworn, on oath certifies and says: That he is one of the attorneys

for appellant in this cause; that he makes this certificate in compliance with Rule 23 of the rules of this court; that in his judgment the within and foregoing petition for rehearing is well founded and is not interposed for purposes of delay.

s/ Finton J. Phelan, Jr.
FINTON J. PHELAN, JR.

Subscribed and sworn to before me at Agana, Guam, this 18th day of June 1964.

s/ Helena F. Phelan
HELENA F. PHELAN
Notary Public in and for the Unincorporated territory of Guam

My commission expires: April 13, 1967

No. 18,569

IN THE

United States Court of Appeals

For the Ninth Circuit

JOHN D. FORBES and ROSALIND L. FORBES,
Appellants,

vs.

A. G. MADDOX, Commissioner of Internal Revenue and Taxation, Government of Guam,
Appellee.

On Appeal from the Order of the District Court of Guam

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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INDEX

Cases

Statutes

Other Authorities

No. 18,569

IN THE

United States Court of Appeals

For the Ninth Circuit

JOHN D. FORBES and ROSALIND L. FORBES,
Appellants,

vs.

A. G. MADDOX, Commissioner of Internal Revenue and Taxation, Government of Guam,
Appellee.

On Appeal from the Order of the District Court of Guam

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

This memorandum is filed in response to the order of this Court, dated May 7, 1964, inviting the United States to file a brief expressing its views on the issues involved in this matter.[1] Upon receipt of the order and in view of the interest of the Departments of the Treasury and the Interior in the issues involved, letters were written to those Departments inviting their

[1]The opinion of the District Court is reported at 212 F. Supp. 662.

comments. Their replies are set forth in Appendix B, *infra.*

1. In 1958, the Guam legislature enacted Section 19700, II Government Code of Guam (1961) (Appendix A, *infra*), which provides that "the District Court of Guam shall * * * have the same jurisdiction with regard to the said [Guam Territorial] Income Tax as the Tax Court of the United States has with respect to the United States income tax." Section 19700 further provides that a taxpayer may file a petition with the District Court for a redetermination of a deficiency within 90 days (or 150 days) after the notice of deficiency is mailed. This provision became effective on March 14, 1958.

A. Article IV, Section 3, of the Constitution of the United States gives Congress authority "to * * * make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." Accordingly, Congress has prescribed organic acts for the territories which take the place of a constitution as the fundamental law of the territory involved. *National Bank v. County of Yankton,* 101 U. S. 129, 133.

Guam is an unincorporated territory of the United States and the basic charter for its government is the Organic Act of Guam, c. 512, 64 Stat. 384, Section 3 (48 U.S.C. 1958 ed., Sec. 1421a). The legislative power of Guam is vested in its legislature (Section 10, Organic Act of Guam (Appendix A, *infra*)), and it extends "to all subjects of legislation of local application not inconsistent with the provisions of this

Act [the Organic Act of Guam] and the laws of the United States applicable to Guam" (Section 11, Organic Act of Guam (Appendix A, *infra*)).

In *Granville-Smith v. Granville-Smith,* 349 U. S. 1, 9-10, a case involving the power of another unincorporated territory, the Virgin Islands, to enact divorce laws, the Supreme Court noted that two considerations were involved in giving content to the power of the territorial legislature to pass legislation having "local application": (1) that the subjects of legislation have relevant ties, within the territory, to laws growing out of the needs of the territory and government relations within it; and (2) that the power could not exceed the scope of all rightful subjects of legislation.

B. The administration and collection of the Guam Territorial income tax is a proper subject of legislation of "local application" within the meaning of Section 11 of the Organic Act. At the time Section 19700 was enacted to give the District Court jurisdiction to entertain petitions to review deficiencies asserted by the Commissioner, Section 31 of the Organic Act of Guam (Appendix A, *infra*) provided that "The income-tax laws in force in the United States of America and those which may hereafter be enacted shall be held to be likewise in force in Guam." In effect, this provision adopted the revenue laws of the United States, such as the Internal Revenue Code of 1954, and used them to impose a local income tax which was enforced by the Government of Guam. *Laguana v. Ansell,* 102 F. Supp. 919 (Guam), affirmed

per curiam, 212 F. 2d 207 (C. A. 9th), certiorari denied, 348 U. S. 830; *Wilson v. Kennedy,* 232 F. 2d 153 (C. A. 9th); *Jennings v. United States,* 168 F. Supp. 781 (Ct. Cl.).[2] Accordingly, an enactment of the Guam legislature which grants jurisdiction to the District Court to review deficiencies asserted by the Commissioner relates to the internal needs and laws of Guam.

With respect to the second consideration, i.e., that the subject of legislation must be a rightful subject, there were no provisions of the Organic Act or the laws of the United States applicable to Guam with which Section 19700 was inconsistent at the time it became effective on March 14, 1958. Section 22(a) of the Organic Act of Guam (Appendix A, *infra*) provided that the judicial authority of Guam was vested in the District Court and in such other courts as were established by the legislature. Section 22(a) further provided that the District Court had the jurisdiction of a District Court of the United States in all causes arising under the laws of the United States,[3]

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[2]However, a Guam taxpayer may not utilize the Tax Court of the United States because that body has jurisdiction only to consider petitions for redetermination of notices of deficiencies in tax sent by the Secretary of the Treasury, or his delegate. Sections 6212(a), 6213(a), and 7442, Internal Revenue Code of 1954 (26 U.S.C. 1958 ed., Secs. 6212, 6213, and 7442); *Jones v. Commissioner,* Tax Court Docket No. 71931, dismissed May 29, 1958 (order dismissing petition relating to Guam Territorial income tax for want of jurisdiction); *Dudley v. Commissioner,* 258 F. 2d 182 (C. A. 3d) (affirming dismissal of petition for redetermination of Virgin Islands income tax).

[3]Section 22(a) was amended after the enactment of Section 19700 by the Act of June 4, 1958, P. L. 85-444, 72 Stat. 178, Section 1, to give the District Court jurisdiction over all federal causes without regard to the amount in controversy. This amendment has no significance for the purposes of this case.

and "original jurisdiction in all other causes in Guam, jurisdiction over which has not been transferred by the legislature to other court or courts established by it * * *." There was no inconsistency between the District Court's jurisdiction to hear local causes and the District Court's jurisdiction under Section 19700 to review deficiencies in Guam Territorial income tax determined by the Commissioner. In essence, Section 19700 provides a remedy or cause of action against the Commissioner.

C. The Third Circuit has indicated approval of a similar statute of the Virgin Islands which gave the District Court of the Virgin Islands jurisdiction to review proposed deficiencies in Virgin Islands income tax. *Dudley v. Commissioner,* 258 F. 2d 182, 188. Section 8 of the Revised Organic Act of the Virgin Islands, c. 558, 68 Stat. 497 (48 U.S.C. 1958 ed., Sec. 1574) states that the legislative power of the Virgin Islands extends to "all subjects of local application".[4] In 1957, the legislature of the Virgin Islands provided for the review by the District Court of the Virgin Islands of deficiencies in Virgin Islands income tax. 5 Virgin Islands Code, Secs. 943 and 944. The provision governing the jurisdiction of the District Court, Section 22 of the Revised Organic Act (48 U.S.C. 1958 ed., Sec. 1612), is identical in substance with the provision governing the jurisdiction of the District Court of Guam, Section 22(a) of the Organic Act of Guam. Similarly, Section 1 of the Act of July 12,

[4]The words "all subjects of local application" were amended to read "all rightful subjects of legislation" by Section 2 of the Act of August 28, 1958, P. L. 85-851, 72 Stat. 1094.

1921, c. 44, 42 Stat. 122 (48 U.S.C. 1958 ed., Sec. 1397), provides that the income tax laws in force in the United States are in force in the Virgin Islands and it imposes a territorial income tax.

2. In 1958, by Section 1 of the Act of August 20, 1958, P. L. 85-688, 72 Stat. 681, Congress amended Section 31 of the Organic Act of Guam (Appendix A, *infra*), the provision dealing with income taxes, by adding several detailed provisions to that section. These amendments do not affect the validity of Section 19700.

A. The local character of the Guam Territorial income tax was further made certain. Subsections (a) and (b) of Section 31 provide that the income tax laws in force in the United States are in force in Guam and are deemed to impose a separate territorial income tax payable to the Government of Guam. The administration and enforcement of the tax is to be performed by the Governor (Section 31(c)); he is authorized to issue needful rules and regulations for the enforcement of the tax (Section 31(d)(2)). Section 31(d)(1) specifies that the income tax laws in force in Guam include, where not manifestly inapplicable or incompatible with the intent of Section 31, all of the provisions of Subtitle F of the Internal Revenue Code of 1954. The subtitle referred to contains the several provisions which deal with the Tax Court of the United States and its review of deficiencies in United States income tax determined by the Secretary of the Treasury, or his delegate. Sections 6212, 6213, 7441 and 7442, Internal Revenue

Code of 1954 (26 U.S.C. 1958 ed., Secs. 6212, 6213, 7441, 7442). This Court has ruled that the Commissioner must wait 90 days before assessing the tax after giving notice pursuant to Sections 6212 and 6213 of the 1954 Code. *Bromerg v. Ingling,* 300 F. 2d 859; *Jones v. Ingling,* 303 F. 2d 438. Since a Guam taxpayer does not have access to the Tax Court of the United States for review of deficiencies in Guam Territorial income tax asserted by the Commissioner (see fn. 1, *supra*), the extension of such review to them by Section 19700 would seem to be entirely compatible with the provisions of the Internal Revenue Code of 1954.

B. Section 31, as amended, also details the jurisdiction of the District Court in income tax matters. Section 31(h)(1) provides that the District Court shall have "exclusive original jurisdiction over all judicial proceedings in Guam, both criminal and civil, * * * with respect to the Guam Territorial income tax." Section 31(h)(5) provides that such jurisdiction shall not be subject to transfer to any other court, notwithstanding the provisions of Section 22(a). Since Section 22(a) authorized the legislature of Guam to transfer jurisdiction over local causes to such other courts as it established, it is clear that the purpose of subsections (h)(1) and (h)(5) of Section 31 is to restrict that power to the end that jurisdiction over income tax matters remains in the District Court. Section 19700 is consistent with this purpose.

Another provision of Section 31, as amended, provides that suits for recovery of Guam Territorial in-

come taxes alleged to have been erroneously collected can be maintained against the Government of Guam. Section 31(h)(2), Organic Act of Guam. The purpose of this provision is to allow the aggrieved taxpayer to bring his suit against the Government of Guam. S. Rep. No. 2176, 85th Cong., 2d Sess., p. 1 (1958-3 Cum. Bull. 352). Compare Section 7422, Internal Revenue Code of 1954 (26 U.S.C. 1958 ed., Sec. 7422). Previously, the taxpayer had to sue the official charged with the duty of collecting such taxes. *Crain v. Government of Guam,* 195 F. 2d 414 (C. A. 9th).

C. In its opinion, the District Court relied (R. 20-21) upon certain correspondence between the Departments of the Treasury and the Interior concerning a proposal to grant to the District Court jurisdiction to review deficiencies in Guam Territorial income tax in the legislation (H. R. 12569, 85th Cong., 2d Sess.) which was introduced into Congress and which was ultimately enacted to add the amendments to Section 31 which have been just discussed. However, the legislation as forwarded to Congress made no reference to preassessment review jurisdiction. H. Rep. No. 2273, 85th Cong., 2d Sess., pp. 4-5, 9-11 (1958-3 Cum. Bull. 353, 355-356, 358-360). There is, therefore, no indication that Congress was aware of the proposal to confer such jurisdiction upon the District Court. Consequently, the failure of Congress to include such a provision in the Act of August 20, 1958, P. L. 85-688, 72 Stat. 681, Section 1, cannot be said to indicate an intent on the part of Congress to limit the jurisdiction of the District Court to refund

suits and, by implication, to annul Section 19700. Repeal by implication of an earlier law by a later one is not favored; there must be a positive repugnancy between the old law and the new. *Wood v. United States,* 16 Pet. 342, 362-363; *Wright v. Ynchausti & Co.,* 272 U. S. 640, 650-651.

Moreover, the subsequent legislative history of Section 31 tends to show that there is no inconsistency between it and section 19700. The Guam act was reported to Congress on September 18, 1959 (Letter of Lewis S. Flagg, III, Associate Solicitor, Department of the Interior, to Louis F. Oberdorfer, Assistant Attorney General, dated May 25, 1964 (Appendix B, *infra*)), and Congress has taken no steps to annul it. Finally, although the Department of the Treasury was opposed in principle to legislation giving deficiency review jurisdiction to the District Court, it views Section 19700 as being within the legislative power of Guam. Letter of G. d'Andelot Belin, General Counsel, Department of the Treasury, to Louis F. Oberdorfer, Assistant Attorney General, dated June 25, 1964 (Appendix B, *infra*).

D. The sequence in which Section 31 was amended and the enactment of Section 19700 was reported to Congress is important for another reason. All laws enacted by the Guam legislature must be reported to Congress, and it has reserved the power to annul them. If a law is not annulled within one year of the date of receipt of the law by Congress, it is deemed to have been approved. Section 19, Organic Act of Guam (Appendix A, *infra*). Section 19700 has not been expressly annulled.

Accordingly, we are of the view that the District Court had jurisdiction to entertain the petition of the taxpayers under Sections 22(a) and 31(h)(1) of the Organic Act of Guam and Section 19700 of the Government Code of Guam.

Respectfully submitted,

LOUIS F. OBERDORFER,
Assistant Attorney General.
LEE A. JACKSON,
I. HENRY KUTZ,
J. EDWARD SHILLINGBURG,
Attorneys,
Department of Justice,
Washington, D. C. 20530.

August, 1964.

(Appendices A and B Follow)

Appendices.

Appendix A

Organic Act of Guam, c. 512, 64 Stat. 384:

Sec. 10. The legislative power of Guam, except as otherwise provided in this Act, shall be vested in a legislature which shall consist of a single house of not to exceed twenty-one members to be elected at large. * * *

(48 U.S.C. 1958 ed., Sec. 1423.)

Sec. 11. The legislative power of Guam shall extend to all subjects of legislation of local application not inconsistent with the provisions of this Act and the laws of the United States applicable to Guam. * * *

(48 U.S.C. 1958 ed., Sec. 1423a.)

Sec. 19. * * *. All laws enacted by the legislature shall be reported by the Governor to the head of the department or agency designated by the President under section 3 of this Act, and by him to the Congress of the United States, which reserves the power and authority to annul the same. If any such law is not annulled by the Congress of the United States within one year of the date of its receipt by that body, it shall be deemed to have been approved.

(48 U.S.C. 1958 ed., Sec. 1423i.)

Sec. 22. (a) There is hereby created a court of record to be designated the "District Court of Guam", and the judicial authority of Guam shall be vested in the District Court of Guam and in such court or courts as may have been or may hereafter be established by the laws of Guam.

The District Court of Guam shall have, in all causes arising under the laws of the United States, the jurisdiction of a district court of the United States as such court is defined in section 451 of title 28, United States Code, and shall have original jurisdiction in all other causes in Guam, jurisdiction over which has not been transferred by the legislature to other court or courts established by it, and shall have such appellate jurisdiction as the legislature may determine. * * *.

* * * * * * *

(48 U.S.C. 1952 ed., Sec. 1424.)

Sec. 31. The income-tax laws in force in the United States of America and those which may hereafter be enacted shall be held to be likewise in force in Guam.

(48 U.S.C. 1952 ed., Sec. 1421i.)

Sec. 31 [as amended by Sec. 1, Act of August 20, 1958, P. L. 85-688, 72 Stat. 681].

(a) The income-tax laws in force in the United States of America and those which may hereafter be enacted shall be held to be likewise in force in Guam.

(b) The income-tax laws in force in Guam pursuant to subsection (a) of this section shall be deemed to impose a separate Territorial income tax, payable to the government of Guam, which tax is designated the "Guam Territorial income tax".

(c) The administration and enforcement of the Guam Territorial income tax shall be performed by or under the supervision of the Governor. Any function needful to the administra-

tion and enforcement of the income-tax laws in force in Guam pursuant to subsection (a) of this section shall be performed by any officer or employee of the government of Guam duly authorized by the Governor (either directly, or indirectly by one or more redelegations of authority) to perform such function.

(d) (1) The income-tax laws in force in Guam pursuant to subsection (a) of this section include but are not limited to the following provisions of the Internal Revenue Code of 1954, where not manifestly inapplicable or incompatible with the intent of this section: Subtitle A (not including chapter 2 and section 931); chapters 24 and 25 of subtitle C, with reference to the collection of income tax at source on wages; and all provisions of subtitle F which apply to the income tax, including provisions as to crimes, other offenses, and forfeitures contained in chapter 75. For the period after 1950 and prior to the effective date of the repeal of any provision of the Internal Revenue Code of 1939 which corresponds to one or more of those provisions of the Internal Revenue Code of 1954 which are included in the income-tax laws in force in Guam pursuant to subsection (a) of this section, such income-tax laws include but are not limited to such provisions of the Internal Revenue Code of 1939.

(2) The Governor or his delegate shall have the same administrative and enforcement powers and remedies with regard to the Guam Territorial income tax as the Secretary of the Treasury, and other United States officials of the executive branch, have with respect to the United States income tax. Needful rules and regulations for

enforcement of the Guam Territorial income tax shall be prescribed by the Governor. The Governor or his delegate shall have authority to issue, from time to time, in whole or in part, the text of the income-tax laws in force in Guam pursuant to subsection (a) of this section.

(e) In applying as the Guam Territorial income tax the income-tax laws in force in Guam pursuant to subsection (a) of this section, except where it is manifestly otherwise required, the applicable provisions of the Internal Revenue Codes of 1954 and 1939, shall be read so as to substitute "Guam" for "United States", "Governor or his delegate" for "Secretary or his delegate", "Governor or his delegate" for "Commissioner of Internal Revenue" and "Collector of Internal Revenue", "District Court of Guam" for "district court" and with other changes in nomenclature and other language, including the omission of inapplicable language, where necessary to effect the intent of this section.

(f) Any act or failure to act with respect to the Guam Territorial income tax which constitutes a criminal offense under Chapter 75 of subtitle F of the Internal Revenue Code of 1954, or the corresponding provisions of the Internal Revenue Code of 1939, as included in the income-tax laws in force in Guam pursuant to subsection (a) of this section, shall be an offense against the government of Guam and may be prosecuted in the name of the government of Guam by the appropriate officers thereof.

(g) The government of Guam shall have a lien with respect to the Guam Territorial income tax in the same manner and with the same effect,

and subject to the same conditions, as the United States has a lien with respect to the United States income tax. Such lien in respect of the Guam Territorial income tax shall be enforceable in the name of and by the government of Guam. Where filing of a notice of lien is prescribed by the income-tax laws in force in Guam pursuant to subsection (a) of this section, such notice shall be filed in the Office of the Clerk of the District Court of Guam.

(h) (1) Notwithstanding any provision of section 22 of this Act or any other provision of law to the contrary, the District Court of Guam shall have exclusive original jurisdiction over all judicial proceedings in Guam, both criminal and civil, regardless of the degree of the offense or of the amount involved, with respect to the Guam Territorial income tax.

(2) Suits for the recovery of any Guam Territorial income tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, under the income-tax laws in force in Guam, pursuant to subsection (a) of this section, may, regardless of the amount of claim, be maintained against the government of Guam subject to the same statutory requirements as are applicable to suits for the recovery of such amounts maintained against the United States in the United States district courts with respect to the United States income tax. When any judgment against the government of Guam under this paragraph has become final, the Governor shall order the pay-

ment of such judgments out of any unencumbered funds in the treasury of Guam.

(3) Execution shall not issue against the Governor or any officer or employee of the government of Guam on a final judgment in any proceeding against him for any acts or for the recovery of money exacted by or paid to him and subsequently paid into the treasury of Guam, in performing his official duties under the income-tax laws in force in Guam pursuant to subsection (a) of this section, if the court certifies that—

(A) probable cause existed; or

(B) such officer or employee acted under the directions of the Governor or his delegate.

When such certificate has been issued, the Governor shall order the payment of such judgment out of any unencumbered funds in the treasury of Guam.

(4) A civil action for the collection of the Guam Territorial income tax, together with fines, penalties, and forfeitures, or for the recovery of any erroneous refund of such tax, may be brought in the name of and by the government of Guam in the District Court of Guam or in any district court of the United States or in any court having the jurisdiction of a district court of the United States.

(5) The jurisdiction conferred upon the District Court of Guam by this subsection shall not be subject to transfer to any other court by the legislature, notwithstanding section 22(a) of this Act.

(48 U.S.C. 1958 ed., Sec. 1421i.)

II Government Code of Guam (1961):

§ 19700. *District Court Jurisdiction.* In addition to such other jurisdiction as the District Court of Guam has with respect to the Income Tax provided by Section 31 of the Organic Act of Guam and pursuant to the United States Internal Revenue Code of 1939, as amended, and the United States Internal Revenue Code of 1954, as amended, and any future amendments thereto, the District Court of Guam shall also have the same jurisdiction with regard to the said Income Tax as the Tax Court of the United States has with respect to the United States income tax. The taxpayer may file a petition with the District Court of Guam for a redetermination of a deficiency within ninety (90) days after the notice of deficiency is mailed, or one hundred and fifty (150) days if the notice is mailed to a person outside the territory of Guam, (Not counting Saturday, Sunday, or a legal holiday in Guam as the last day). The District Court of Guam shall implement this Chapter, as may be necessary, by rules and procedure.

Appendix B

United States
Department of the Interior
Office of the Solicitor
Washington 25, D.C.

In Reply Refer To
5-11112
May 25, 1964

Hon. Louis F. Oberdorfer
Assistant Attorney General
Tax Division
Department of Justice
Washington, D. C. 20530

Attention: Mr. I. Henry Kutz

Dear Mr. Oberdorfer:

This replies to your letter of May 15, 1964, to Mr. Frank J. Barry, Solicitor of this Department, with regard to proceedings styled *John D. Forbes, et al. v. A. G. Maddox, Commissioner of Internal Revenue and Taxation, Government of Guam* (C. A. 9th-No. 18,569). We understand that you desire our comments on the legal issues involved in the case, since you have been requested by the Ninth Circuit to file an amicus brief.

We have reviewed the decision of Judge Shriver of the District Court of Guam, the briefs filed by both the appellants and appellee before the United States Court of Appeals for the Ninth Circuit, pertinent correspondence in the files of the Office of Territories,

the official legislative history of Public Law 85-688 (72 Stat. 681), which amended Section 31 of the Organic Act of Guam and this Department's own legislative file on Public Law 85-688. It is our conclusion that Judge Shriver's decision is in error. We concur in and adopt the views expressed and the arguments advanced in the appeal briefs of both parties, with one minor caveat indicated below.

It is indeed unusual and striking in a jurisdictional question of this nature to find both parties to the case in absolute agreement that the lower court was in error in denying its own jurisdiction. We share their view that the source material used by the District Court in reaching this decision was, to say the least, unusual. The comment in the appellants' brief on the bottom of page 8 and the top of page 9 addresses itself to this unusual circumstance, but fails to note a significant fact. Congress did not in fact dispose of the objection of the Department of the Treasury by enacting the statute.

Rather, it was never aware of the objection. The interdepartmental correspondence between Interior and Treasury with regard to a possible provision to specifically confirm the preassessment review jurisdiction of the Guam District Court remained entirely within the Executive Branch. Congress was not made aware that such a suggestion had been made since the bill which was finally cleared by the Bureau of the Budget and submitted to Congress did not contain the controversial provision. It cannot be said, as is implicit in Judge Shriver's decision, that the failure of Con-

gress to include such a provision in Public Law 85-688 resulted from the Treasury Department's opposition. Therefore one cannot imply any intent to exclude such jurisdiction.

On page 4 of the appellee's brief it is stated that there is a presumption that Congress was informed of the enactment of Section 19700, Chapter 9, Title XX, Government Code of Guam, the Act whereby the Guam Legislature specifically conferred preassessment review jurisdiction on the District Court of Guam. We can confirm that this Department, by identical letters of September 18, 1959, to the President of the Senate and Speaker of the House, signed by Administrative Assistant Secretary Otis Beasley, did in fact inform Congress of the enactment of this legislation.

Finally, should the issue again be raised, we are in agreement with the view expressed in a memorandum by Mr. Ben-Horin of your office to Mr. Kutz of your office dated November 4, 1963, that the Tax Court of the United States possesses no jurisdiction with respect to the Guam Territorial Income Tax.

In view of the above, it is the recommendation of this Department that the amicus brief to be filed by the Department of Justice support the view that the District Court of Guam does have preassessment review jurisdiction.

Sincerely yours,

/s/ Lewis S. Flagg, III

Lewis S. Flagg, III
Associate Solicitor
Territories, Wildlife and Parks

General Counsel
Treasury Department
Washington

CC:I:I-1359 Jun 25 1964
3:EMF

Honorable Louis F. Oberdorfer
Assistant Attorney General
Tax Division
Department of Justice

Washington, D. C. 20530

Attention: Mr. I. Henry Kutz

In re: John D. Forbes, et al. v. A. G. Maddox, Commissioner of Internal Revenue and Taxation, Government of Guam
(C. A. 9th-No. 18,569)

Dear Mr. Oberdorfer:

Your letter of May 15, 1964, requested our views on the issues in the above-styled case, since you are preparing a brief as *amicus* to be filed with the Court of Appeals.

This appeal arises from a petition filed by appellants in the District Court of Guam to redetermine proposed deficiencies in Guam Territorial income tax asserted by the Commissioner of Internal Revenue and Taxation of the Government of Guam for the taxable years 1959 and 1960. The District Court, in an opinion by Judge Shriver (212 F. Supp. 662 (1963)), dismissed the petition on the ground that the court had no jurisdiction to entertain it, but only to decide a suit for refund. The court reviewed the his-

tory of Pub. L. 85-688, section 1, 72 Stat. 681, 48 U.S.C. 1421i, effective August 20, 1958, which amended section 31, Organic Act of Guam, August 1, 1950, c. 512, 64 Stat. 384, including the correspondence between the Interior and Treasury Departments wherein this Department objected to a proposal that Congress confer preassessment review jurisdiction on the District Court of Guam. Judge Shriver concluded that Pub. L. 85-688 limited his jurisdiction "to that which may properly be exercised by a United State district court in connection with United States income taxes." The taxpayers have appealed and both they and the Commissioner contend that the District Court had jurisdiction to entertain the petition, in part because of the passage by the Guam Legislature of Section 19700, Chapter 9, Title XX, Government Code of Guam, effective March 14, 1958, which purported to grant to the District Court of Guam the same jurisdiction with regard to the Guam Territorial income tax as the Tax Court of the United States exercises with respect to the United States income tax.

You have asked our opinion whether Guam Code section 19700 lawfully conferred jurisdiction on the District Court of Guam to entertain petitions for redetermination of proposed deficiencies in Guam Territorial income tax, and, if so, what effect, if any, the subsequent enactment of section 1421i(h), 48 U.S.C., had on section 19700.

It is our conclusion that section 19700 validly granted jurisdiction to the District Court of Guam for preassessment review of proposed deficiencies in

Guam Territorial income tax, and that section 1421i (h) did not repeal it.

The history of the draft bill which became Pub. L. 85-688 shows that Congress, so far as we know, was not aware of the proposal to confer preassessment review jurisdiction on the District Court of Guam or of Treasury's objection to it, since the correspondence mentioned by Judge Shriver remained within the Executive Branch. Therefore, we submit, the failure of Congress to include such a provision in Pub. L. 85-688 cannot be said to have resulted from this Department's objection to such jurisdiction, or imply any intent to exclude it.

We admit that Pub. L. 85-688 may be read as limiting the jurisdiction of the District Court of Guam to the sole remedy of refund suits by Guam taxpayers, and in giving to such taxpayers certain remedies equivalent to those available under United States income tax laws, this statute could be construed as an intentional omission by Congress of the right to petition for prepayment review. Since, however, there was no such proposal in H.R. 12569 we should not assume that Congress evinced any intention not to allow the Guam Legislature to confer such jurisdiction, if it so chose.

Therefore, in view of section 1424 of the Organic Act of Guam authorizing the Guam Legislature to confer on the District Court original jurisdiction in local matters not conferred on other courts and in view of section 1421i(h)(1) of the same Organic Act conferring on the District Court sole original juris-

diction in Guam income tax cases, it is our opinion that Guam Code Section 19700 represents a valid enactment by the Guam Legislature.

If we can further assist you in this case, please do not hesitate to call us.

Sincerely yours,
/s/ G. d'Andelot Belin
G. d'Andelot Belin
General Counsel

Enclosure

See also Vol. 32 #41

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 18,577

CABLE VISION, INC., et al., *Appellants,*

vs.

THE KLIX CORPORATION, et al, *Appellees.*

PETITION FOR REHEARING

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INDEX OF AUTHORITIES

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 18,577

CABLE VISION, INC., et al., *Appellants,*

vs.

THE KLIX CORPORATION, et al, *Appellee*

PETITION FOR REHEARING

TO THE HONORABLE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT:

The KLIX Corporation, Appellee, respectfully petitions for a rehearing in the above entitled cause and petitions that the decision entered herein on July 15, 1964 be set aside and that the judgment of the trial court be affirmed, and in support thereof, respectfully shows and alleges:

PETITION FOR REHEARING

I. The decision is erroneous in holding that copyrighted and uncopyrightable materials are in the public domain.

A. The monopoly granted the proprietor of the copyright during its term is totally inconsistent with the concept that the copyrighted material is in the public domain in any sense relevant to the instant case.

B. The holding that uncopyrightable program material necessarily is in the public domain is in conflict with the rule established in the United States Supreme Court by *International News Service v. Associated Press* (1918) 248 U.S. 215, 63 L.Ed. 211, 39 S. Ct. 68, 2 ALR 293, and cases cited therein. The holding is also inconsistent with the holding of this court in *Associated Press v. KVOS, Inc.* (CCA 9, 1935) 80 F(2d) 575, the Third Circuit in *Ettore v. Philco Broadcasting Co.* (CCA 3, 1956) 229 F(2d) 481 cert. d. 351 U.S. 826, 100 L.Ed. 1456, 76 Sup. Ct. 783, and the Second Circuit in *Capitol Records v. Mercury Records* (CCA 2, 1955) 221 F(2d) 657. Generally speaking, the most valued programs in the television industry are those which are released simultaneously with their occurrence: i.e., sporting events, network "extravaganzas", and news programs. They are uncopyrightable, not because of any want of creativity or novelty, as were the articles involved in *Compco Corp. v. Daybright Lighting* 376 U.S. 234, and *Sears Roebuck Co. v. Stiffel Co.* 376 U.S. 225, but by reason of the nature of the program content and that it is broadcast simultaneously with its creation. No federal policy precludes judicial protection of property rights in programs in this category.

C. The decision is ambiguous and inconsistent with respect to the status of property rights subject to the provisions of 17 USCA 2. Footnote 3 indicates that such programs being uncopyrighted are not protectable since protection would "counter the federal policy of free access". *Columbia Broadcasting System, Inc. v. Documentaries, Ltd.*, 32 U.S. Law Week 2516, and *Woods Associates, Inc. v. Skene,* 32 U.S. Law Week 2595, which apply the section, are cited with approval

in Point II of the Opinion. Point V indicates that a derivative statutory copyright action is the sole remedy, notwithstanding that the federal remedies are not applicable to programs in this category. The opinion should be clarified to hold that programs subject to common law copyright rules are not in the public domain; that their protection is not contrary to federal policy, and that state remedies are applicable to them because they are not reached by the Copyright Act.

D. Footnote 3 of the Opinion turns the case upon a defense never properly raised. The validity of a copyright cannot be raised for the first time on appeal. *Davilla v. Brunswick-Balke Collender Co.* (CCA 2, 1938) 94 F(2d) 567, cert. den. 58 S. Ct. 1040, 304 U.S. 572, 82 L.Ed 1536; *Johns Printing Co. v. Paull's Music Corp.* (CCA 8, 1939) 102 F(2d) 282. There was never any pleading to the effect that any of the programs were in the public domain. Appellant's opening brief in this court does not mention the subject whatever, and its Reply Brief urges not only that the record supports the trial court's finding number 8, but that " . . . proprietors of virtually all featured television programs (network or syndicated) claim statutory copyright in them". (Reply Brief, p. 8). The ownership of the original rights in all programs and the power of the program supplier to grant exclusivity through contracts were not denied. If any particular program was in the public domain, such defense should have been pleaded; not having been pleaded, it is waived. (Rule 12(h) Rules of Civil Procedure.)

E. *Compco* and *Sears* are not applicable: there the articles were in the public domain; here the programs are not in the public domain.

II. The court erred in holding that a state remedy, to-wit, an injunction for tortious interference with contractual relationships, does not apply when the subject of the contract is copyrighted material.

A. The counterclaim of The KLIX Corporation is not essentially a copyright action as characterized by this court. It invokes instead a state remedy to prevent tortious interference with the economic benefit conferred by contract.

B. Infringement of a statutory copyright is a specific distinct tort designed to afford relief to the copyright proprietor. *Leo Feist v. Young* (CCA 7, 1943) 138 F(2d) 972 and authorities cited. Interference with economic relationships arising out of contracts is an entirely different legal wrong designed to protect wholly different legal interests. That the commission of the federal tort constitutes all or a part of the means whereby the state tort is committed does not protect against liability for the latter. See cases cited in Appellee's original brief, note 39, and see comments (b) and (h) to the Restatement on Torts, Sec. 766.

C. State courts have jurisdiction and state remedies are applicable to determine all questions involving copyrights, applying contract and tort principles, except the specific tort of infringement of a statutory copyright. *Parissi v. General Electric Co.* (N.D.N.Y. 1951) 97 F.Supp. 333; *Muse v. Mellin* (S.D.N.Y. 1962) 212 F. Supp. 315 and authorities cited. cf. *Republic Pictures Corp. v. Security First National Bank* (CCA 9 1952) 197 F(2d) 767. State remedies are not precluded merely because a federally created monopoly is the subject of the action. *Becher v. Contoure Laboratories* (1927) 279 U.S. 388, 73 L.Ed. 752, 49 S.Ct. 356,

cf. *Radio Station WOW v. Johnson* (1944) 326 U.S. 120, 89 L.Ed. 2092, 65 S. Ct. 1475.

D. The holding that the tortious interference doctrine is not applicable to contracts dealing with copyrighted articles is contrary to *Meyer v. Wash Times* (Ct. App. D.C. 1935) 76 F(2d) 988; *New York Phonograph Co. v. Jones* (Cir. Ct. N.Y. 1903) 123 Fed. 197; *New England Phonograph Co. v. Edison* (Cir. Ct. D.N.J. 1901) 110 Fed. 26, and *New York Phonograph Co. v. National Phonograph Co.* (Cir. Ct. S.D.N.Y. 1902) 112 Fed. 822, and the holding that such doctrine is not applicable where the subject of the contract is property other than copyrighted material, is contrary to *Capitol Records v. Mercury Records, supra; Ettore v. Philco, supra,* and *Uproar v. NBC et al.* (D.C. Mass. 1934) 8 F.Supp. 358, modified and affirmed (1936, CCA 1) 81 F(2d) 373, cert. den. 298 U.S. 670, 80 L.Ed. 1393, 56 S. Ct. 835.

E. *Sears* and *Compco* do not prohibit the application of the doctrine of tortious interference with contractual relationships where the subject matter of the contract is not in the public domain.

Respectfully submitted this 10th day of August, 1964.

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1020 Kearns Bldg.
Salt Lake City. Utah

EDWARD M. BENOIT
Twin Falls Bank & Trust Bldg.
Twin Falls, Idaho

Attorneys for Appellee

CERTIFICATE OF COUNSEL

This is to certify that the within and foregoing petition is filed in good faith, and not interposed for delay, and that in the preparation and filing of this petition I have examined the Rules of the United States Court of Appeals for the Ninth Circuit, as reported in 28 U.S.C.A. 483-490, and that in my opinion the said brief is in full compliance with said rules.

/s/ George M. McMillan

No. 18,671

IN THE

United States Court of Appeals

For the Ninth Circuit

MANILA TRADING & SUPPLY COMPANY (GUAM), INC.,
Appellant,

vs.

A. G. MADDOX,
Appellee.

APPELLEE'S PETITION FOR A REHEARING

HAROLD W. BURNETT,
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Attorney for Appellee and Petitioner.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

No. 18,671

IN THE

United States Court of Appeals

For the Ninth Circuit

MANILA TRADING & SUPPLY COMPANY (GUAM), INC.,
Appellant,

vs.

A. G. MADDOX,
Appellee.

APPELLEE'S PETITION FOR A REHEARING

To the Honorable Stanley N. Barnes, Charles M. Merrill and James R. Browning, Judges of the United States Court of Appeals for the Ninth Circuit:

Comes now the appellee in the above-entitled case, and respectfully prays the court to grant a rehearing.

1. Appellee believes that the tax imposed and collected falls within the ruling of the Supreme Court of the United States in the case of *General Motors Corporation v. Washington,* decided June 8, 1964, and that District Court of Guam's opinion is correct within said ruling.

2. Appellee does not request rehearing on its counterclaim reversed by this court.

Respectfully submitted,

HAROLD W. BURNETT,
Attorney General,
Attorney for Appellee and Petitioner.

Dated, Agana, Guam,
August 7, 1964.

CERTIFICATE OF COUNSEL

I, Harold W. Burnett, attorney for the appellee, certify that this petition is presented in good faith, that it is not interposed for delay, and that in my judgment, it is well founded.

HAROLD W. BURNETT

Subscribed and sworn to before me this 7th day of August, 1964.

(Seal)

GREGORIO S. BABAUTA
Notary Public in and for the Territory of Guam

My Commission Expires March 8, 1966.

No. 18,687

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

NU-MATIC NAILER INTERNATIONAL CORP.,

Appellant,

vs.

CLYDE WEEMS,

Appellee.

PETITION FOR REHEARING.

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No. 18,687

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

NU-MATIC NAILER INTERNATIONAL CORP.,

Appellant,

vs.

CLYDE WEEMS,

Appellee.

PETITION FOR REHEARING.

To the Honorable Chambers, Circuit Judge, Koelsch, Circuit Judge, and Jameson, District Judge:

This Court has requested the District Court to vacate its findings and judgment and enter new ones—and to distinguish accused device No. 1 from accused device No. 2 in such proposed findings. In making this request, this Court has stated as its reason that "the essence of the supplemental complaint is that accused device No. 2 is so similar to accused device No. 1 that the first judgment covers it".

The supplemental complaint in its prayer for relief, merely requests that defendant be enjoined from infringing United States Letters Patent No. 2,546,354. The supplemental complaint is in accord with the contempt hearing in which the Judge concluded that he would not decide whether accused device No. 2 corresponded to accused device No. 1 *relative to infringe-*

ment of the patent. In other words, the result of the contempt hearing was that accused device No. 2 differed from accused device No. 1 to such an extent that a separate trial was required with respect to the infringement issue of accused device No. 2.

After a lengthy and prolonged trial as well as several post-trial hearings, the second trial Judge concluded that accused device No. 2 did not infringe the patent.

The findings as proposed by this Court would be of evanescent value, for the test of infringement is but the test of trespass upon the claimed property defined by word boundaries. If accused device No. 2 were materially distinguished from accused device No. 1 in mechanical structure and operation, it might fall on the black side of the gray area of the claimed property and yet still infringe if it overlapped the boundaries of same—even though accused device No. 1 fell on the white side. Contrawise, accused device No. 2 might be very close in structure and operation to accused device No. 1 and not infringe even though it also fell on the white side of the gray area of the claimed patent property. Thus, the task of meaningfully comparing different devices is a difficult and elusive problem not appropriately susceptible of succinct findings suggested by this Court, particularly when the issue tried was only that of infringement.

Moreover, the only conceivable purpose in having findings distinguishing accused device No. 2 from accused device No. 1 would be to show that such machines were different such that the affirmative defense of *res judicata* would be inapplicable. However, (as hereinbefore stated) plaintiff did not pray for relief

on the basis of the doctrine of *res judicata* and did not direct its evidence towards such a contention.

To require the District Court to set forth findings supporting the inapplicability of such doctrine is analogous to stating that the District Court has a duty to state in its findings why any possible affirmative defense (as provided in Federal Rules of Civil Procedure 8 (c)), for example, does not apply. Such a ruling is beyond the scope of Rule 52, FRCP, and particularly so in the present case wherein the contempt hearing, in effect, found the doctrine of *res judicata* inapplicable and the ultimate issue of infringement necessary to be tried.

In view of the foregoing, a rehearing in this matter is respectfully requested.

Elliott & Pastoriza,
By William J. Elliott,
Attorneys for Clyde Weems, Appellee.

Certificate of Counsel.

I, William J. Elliott, counsel for Petitioner in the above entitled action, hereby certify that the foregoing petition for rehearing of this cause is presented in good faith and not for delay, and in my opinion is well founded in law and in fact, and proper to be filed herein.

WILLIAM J. ELLIOTT

No. 18703

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

vs.

CRUZ YBARRA, HERMAN VASQUEZ, FRANK TORRES,

Appellants.

APPELLANTS' OPENING BRIEF.

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TOPICAL INDEX

TABLE OF AUTHORITIES CITED

No. 18703

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

vs.

CRUZ YBARRA, HERMAN VASQUEZ, FRANK TORRES,

Appellants.

APPELLANTS' OPENING BRIEF.

Statement of Pleadings and Facts Disclosing Jurisdiction.

The District Court had jurisdiction under Title 18 U. S. C. 3231. This being a proceeding on an indictment filed January 3, 1963, in the United States District Court, Southern District of California, Central Division, under No. 31634 Criminal [C. T. 2].

The appellants were tried by the Court, sitting without a jury, and judgment was pronounced on March 18, 1963 [C. T. 35, 36, 37].

Notice of appeal was timely filed on March 18, 1963 [C. T. 39].

This court has jurisdiction to entertain this appeal and to review the judgment of the District Court pursuant to Title 28 U. S. C. Sections 1291 and 1294 (1).

Statutes Involved.

Title 18, Section 371, U. S. C.

CONSPIRACY TO COMMIT OFFENSE OR TO DEFRAUD UNITED STATES

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both."

Title 21, Section 174, U. S. C.

"Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under Section 7237 (c) of the Internal Revenue Code of 1954 [26 Section 7237 (c)]), the offender shall be imprisoned not less than ten or more than forty years and in addition, may be fined not more than $20,000.

Whenever on trial for a violation of this subsection the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

For provision relating to sentencing probation, etc., see Section 7237 (d) of the Internal Revenue Code of 1954 [26 section 7237].

Whenever on trial for a violation of this subdivision, the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

Statement of the Case.

The indictment in five counts charged the appellants as follows [C. T. 2]:

Count I, from October 31, 1962, until the return of the indictment, the appellants, Cruz Ybarra, Herman Vasquez, and Frank Torres conspired together to receive, conceal, transport and sell narcotics.

Count II, on October 31, 1962, the appellants Cruz Ybarra and Herman Vasquez received, concealed and transported narcotics.

Count III, on October 31, 1962, the appellants Cruz Ybarra, and Herman Vasquez sold narcotics.

Count IV, on November 6, 1962, the appellants Cruz Ybarra, Herman Vasquez and Frank Torres received, concealed, and transported narcotics.

Count V, on November 6, 1962, the appellants Cruz Ybarra, Herman Vasquez and Frank Torres sold narcotics.

Appellant, Cruz Ybarra, was found guilty on all counts [C. T. 35].

Appellant, Herman Vasquez, was found guilty on Counts I, II, and III, and not guilty on Counts IV and V [C. T. 36].

Appellant, Frank Torres, was found guilty of Counts I, IV and V [C. T. 37].

Appellants moved for judgment of acquittal at the close of the government's case in chief, and at the close of all the evidence [R. T. 239 and 354].

Judgment was entered on March 18, 1963 [C. T. 35, 36, 37].

Notice of appeal, filed March 18, 1963 [C. T. 39].

Statement of the Facts.

Date of Event—October 29, 1962:

Joseph Baca testified he accompanied a special employee, Ronald Varela to a location where Cruz Ybarra and Mr. Varela met [R. T. 13]. No conversation overheard [R. T. 21, 22].

Date of Event—October 30, 1962:

Joseph Baca testified he accompanied Mr. Varela to a location where Mr. Varela, Cruz Ybarra, and Frank Torres met [R. T. 18].

Date of Event—October 31, 1962:

Penn Weldon testified he searched and gave money to Mr. Varela. Mr. Varela was seen meeting Mr.

Ybarra and also Mr. Vasquez. Mr. Varela was later seen on a motor bike with Mr. Vasquez and Mr. Ybarra walking on a street [R. T. 28]. Mr. Weldon, pursuant to a radio message approximately ten minutes later, met Mr. Varela who handed him narcotics [R. T. 29].

Peter Niblo testified he observed Mr. Varela and another person ride away on a motor bike until they disappeared from view [R. T. 69].

Date of Event—November 6, 1962:

Richard D. Rock observed Mr. Ybarra and Mr. Varela drive away and then lost sight of them [R. T. 108, 120].

Francis L. Briggs observed Mr. Varela meet with Mr. Ybarra and lost sight of them. Subsequently he met with Mr. Varela who handed him a package containing narcotics [R. T. 193, 211].

Date of Event—November 12, 1962:

Joseph Baca drove Mr. Varela to a location at which time Mr. Varela was wearing a recording device.

Penn Weldon testified he overheard a conversation over a receiver involving two voices, of which he could identify only Mr. Varela's [R. T. 32].

Raymond Velasquez overheard conversation [R. T. 160], and could identify only Mr. Varela's voice [R. T. 161].

Francis L. Briggs testified he overheard conversation [R. T. 195], and could not identify the voice at that time, but heard it again on November 16, 1962 and December 15, 1962.

Substance of Conversation of November 12, 1962:

Mr. Varela addressed another as "Shorty", who stated a meeting was not for tonight, but tomorrow. A number system was suggested to avoid confusion. Discussion about handling a large amount of money was suggested and replied to by the term "crazy". Will this transaction go like the last one, was asked, and was answered, it will be different. It was stated that no-one is to see us or no deal. Mr. Varela stated he did not want to purchase any narcotics at this time. A discussion continued about being careful.

Date of Event—November 13, 1962:

Penn Weldon testified he drove Mr. Varela to a location and later saw Mr. Ybarra walking away. Although Mr. Varela had on a Fargo device, no conversations were overheard [R. T. 36, 37].

Date of Event—November 14, 1962:

Penn Weldon testified he transported Mr. Varela to a location and observed Mr. Varela ride off on a motor bike with Mr. Vasquez, but lost sight of him [R. T. 37]. Although a Fargo device was worn by Mr. Varela there were no conversations overheard [R. T. 54].

Peter Niblo observed Mr. Varela drive away with another person and lost them from view [R. T. 75].

Richard Rock observed Mr. Varela drive away with another person and lost them from view [R. T. 110].

Dennis Cook observed two persons on a motor bike and lost sight of said persons [R. T. 138, 139].

Date of Event—November 16, 1962:

Penn Weldon, Peter Niblo and Richard Rock observed all three appellants in alley with Mr. Varela, but no conversation overheard.

Dennis Cook overheard conversation by receiver from Fargo device between two voices and one word by a third party [R. T. 141]. He could identify Varela's voice only [R. T. 142].

Raymond Velasquez overheard conversation including three voices but could not identify any except Mr. Varela [R. T. 164].

Francis Briggs overheard conversation and related by testimony, substance wherein two persons were engaged [R. T. 203-207], but later testified he heard four voices [R. T. 215].

Substance of Conversation of November 16, 1962:

Mr. Varela stated he did not have a radio on him. Mr. Varela expected to have large amount of money and was seeking to buy heroin. Mr. Varela was referring to a party as Hank. A price was suggested and Mr. Varela stated it was excessive. It could be cheaper on the other side of the border if desired, but Mr. Varela rejected this idea, and was told that is the only way for a cheaper price.

Mr. Varela stated he would advise how we will do it and was answered in the negative, that it would be told to him.

The conversation continued concerning a future meeting in two weeks.

Mr. Varela stated he would like a lower price and was answered by another person, if any available, he would purchase it. A discussion of trust in each other followed with the statement that, I told Homer to go ahead and give it to you the first time. A third voice said, "Yeah".

Date of Event—November 30, 1962:

Francis Briggs testified he returned to location with Mr. Varela but did not see any of the appellants [R. T. 208].

Date of Event—December 16, 1962:

Francis Briggs spoke to Frank Torres and recognized his voice [R. T. 202].

Specifications of Errors.

The evidence is insufficient to sustain conviction of guilt, in that there is not a sufficient showing of the existence of any conspiracy between the appellants.

The evidence furthermore is insufficient in proof of;

1. A sale of narcotics on October 31, 1962;
2. A sale of narcotic on November 6, 1962;
3. Possession of narcotics with knowledge of illegal importation in the appellants on October 31, 1962;
4. Possession of narcotics with knowledge of illegal importation in the appellants on November 6, 1962.

ARGUMENT.

The evidence discloses that Ronald Varela, had been seen with Mr. Ybarra and Mr. Vasquez on October 31, 1962. Mr. Varela disappeared from the view of observing narcotic agents and at a subsequent time delivers a narcotic to the narcotic agents.

Upon this fact we are to conclude that a sale or delivery had been made to Mr. Varela, without the benefit of testimony from Mr. Varela nor by the observance of such fact by the narcotic agents.

There is nothing to indicate that one or the other delivered any narcotics to Mr. Varela or that he acquired it from some unknown source during his absence.

The fact that a subsequent conversation indicated that "Homer gave it to you the first time" does not necessarily indicate this was on October 31, 1962.

It is further argued that the record is bare of any accurate indentification of "Homer".

The evidence in respect to the sale on November 6, 1962, is predicated on the same fact situation. Mr. Varela was seen with Mr. Ybarra and after an absence of observance by the narcotic agents delivers to them a narcotic.

The assumption requested by such a circumstance is that it was obtained from the person last seen with irrespective of any possible intervention by another person or act.

It should be noted that no conversations were overheard on these two dates and the sale transactions themselves rest on the above facts. Subsequent conversa-

tions do not directly refer to the specific narcotic involved, nor to any specific date nor accurately described person.

The argument is based upon the same premise in respect to possession of unlawfully imported narcotics. The circumstantial evidence is without substantial proof to shift the burden of explanation as to its illegal importation.

Although it has been held by this respectful court that possession may be established by circumstantial evidence, such evidence must be of a sufficient nature, and thus not establish a presumption of possession upon which to place the burden of explanation on the appellants.

United States v. Landry, 257 F. 2d 425;

United States v. Ross, 92 U. S. 281, 23 L. Ed. 707.

It is also an evidentiary rule by State in California Code of Civil Procedure, Sections 1957-1960.

The provision which raises a presumption of guilt from the fact of unexplained possession, and thereby in effect shifts the burden of proof to a defendant, is drastic, no doubt designed to meet a menacing situation. Congress has created a presumption upon proof of the existence of a fact, and now the government would have the Court presume the fact. *United States v. Landry,* 257 F. 2d 425.

The circumstantial evidence of sale and possession on October 31, 1962, and November 6, 1962, is the mere association of Mr. Ybarra, Mr. Vasquez and Mr. Varela. Note: Mr. Vasquez was found not guilty of the

November 6, 1962, sale. Any subsequent conversations were not sufficiently connected with these charges of sale and possession by specification.

. . . mere similarity of conduct among various persons and the fact they may have associated with each other, and may have assembled together and discussed common aims and interests, does not necessarily establish proof of the existence of a conspiracy.

> Jury instructions and forms for Federal Criminal cases by the Honorable William C. Mathes; instructions number 1304.

The fact that the appellants had been seen on occasion together assembled is in itself insufficient to establish a conspiracy.

The evidence does not disclose any agreement, offense-object toward which agreement is directed as necessary elements of the offense of conspiracy.

United States v. Guterma, 189 F. Supp. 265.

Although Mr. Ybarra and Mr. Vasquez had been seen together and were allegedly present at a conversation on November 16, 1962, the facts by their own acts do not sufficiently establish any acknowledgment of an agreement. The evidence does not establish sufficiently that Mr. Vasquez had indulged in any conversation or if he did what he had said; without knowledge, intent to participate in an established conspiracy cannot exist.

Dennis v. United States, 302 F. 2d 5.

Since the evidence does not establish that the narcotics specified in the sale of October 31, 1962, and November 6, 1962, were in the possession or under

the control of the three appellants there is not a sufficient showing that they had knowledge of its illegal importation.

United States v. Mills, C. A. Pa. 1961, 293 F. 2d 689.

"To possess means to have actual control, care and management of, and not a passing control, fleeting and shadowy in its nature."

United States v. Landry, 257 F. 2d 425 citing; *United States v. Wainer,* 170 F. 2d 603, 606.

To render evidence of the acts or declarations of an alleged conspirator admissible against an alleged co-conspirator, the existence of the conspiracy must be shown and the connection of the latter therewith established by independent evidence. The existence of the conspiracy cannot be established against an alleged conspirator by evidence of acts or declarations of his alleged co-conspirators, done or made in his absence. *Glover v. United States,* 306 F. 2d 594. Citing *Bartlett v. United States,* 166 F. 2d 920, 925; *Tripp v. United States,* 295 F. 2d 418, 422; *Glasser v. United States,* 315 U. S. 60.

Appellants contend there was not a sufficient independent showing of an established conspiracy and the acts or declarations of an alleged conspirator would not be admissible against an alleged co-conspirator.

The facts disclose that the conversation of November 16, 1962, do not specifically refer to any transaction of October 31, 1962, or November 6, 1962, and thus could not establish proof of an existing conspiracy. Appellants contend that if such conversation existed to the satisfaction of this Court, it was in substance

to possible future conduct, and without any act committed in furtherance thereof would not suffice in proof and evidence to sustain a conviction therefor. . . . Not shown that conspiracy with respect to narcotic drugs involved specific heroin referred to in substantive charges proof that one defendant engaged in such conspiracy would not have warranted his conviction of substantive counts. . . .

Guilt of conspiracy may not be inferred from mere association.

A suspicion, however strong, is not proof, and will not serve in lieu of proof.

The prosecution for unlawful concealment, transportation and sale of 2 ounces of heroin and for conspiracy to conceal, sell, dispense and distribute quantities of narcotic drugs, evidence did not support finding that defendant or alleged co-conspirator was involved in any conspiracy involving the 2 ounces of heroin referred to in substantive counts and did not support conviction of such defendant on the substantive counts. *Evans v. United States,* 257 F. 2d 121.

Evidence as to conversation heard by means of portable radio transmitting and receiving sets should be treated with considerably greater caution than evidence arising from telephone conversation. . . .

United States v. Sansone, 231 F. 2d 887.

The evidence appears to be in direct conflict in relation to testimony given by the narcotic agents in reference to the conversation of November 16, 1962.

Dennis Cook testified he overheard the "substance" of the conversation between two voices and one word

by a third person [R. T. 141] but could identify the voice of Mr. Varela only [R. T. 142].

Raymond Velasquez testified substantially to the same fact [R. T. 164].

Francis Briggs related a conversation overheard that in substance was between two persons, but later testifiled there were four voices [R. T. 215].

The identification was made of Mr. Torres' voice based on a subsequent conversation approximately one month later [R. T. 202]. The fact that he had not seen Mr. Torres at the location prior to the conversation nor had personal knowledge at the time of the conversation of Mr. Torres' presence, nor had ever conversed with or listened to the voice of Mr. Torres create a situation of extreme delicacy in asserting a position that he could recognize the voice one month later. In considering this with caution, human frailties and disabilities cannot be ignored, and appellants contend that such fact is open to extreme and careful scrutiny, especially in the light of a circumstance that this was relied upon the Government.

Conclusion.

Appellants respectfully submit that the evidence is insufficient to sustain a conviction and respectfully prays that the judgment be reversed.

Respectfully submitted,

Beecher S. Stowe, and
Norman J. Kaplan,
By Norman J. Kaplan,
Attorneys for Appellants.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

NORMAN J. KAPLAN

APPENDIX.

Exhibit Index.

Number	Description	Identification	Received
Plaintiff's #1	Narcotics	11	107
Plaintiff's #1A	Narcotics	11	107
Plaintiff's #1B	Narcotics	11	107
Plaintiff's #1C	Narcotics	11	107
Plaintiff's #2	Narcotics	11	194
Plaintiff's #2A	Narcotics	11	194
Plaintiff's #2B	Narcotics	11	194
Plaintiff's #2C	Narcotics	11	194
Plaintiff's #3	Map	12	209

No. 18703

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CRUZ YBARRA, HERMAN VASQUEZ, and FRANK TORRES,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLEE'S BRIEF.

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TOPICAL INDEX

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UNITED STATES OF AMERICA,
Appellee.

APPELLEE'S BRIEF.

I.

JURISDICTION
and
STATEMENT OF THE CASE.

The Federal Grand Jury for the Southern District of California returned Indictment No. 31634-CD on January 3, 1963, charging appellants with violating Title 21, United States Code, Section 174. On February 4, 1963, appellants pleaded not guilty and trial was set for February 18, 1963. On the latter date, appellants waived jury and proceeded to trial before the Honorable Jesse W. Curtis, United States District Judge. On February 20, 1963, the court found all appellants guilty of the conspiracy charged in Count One, and also found them guilty on each of the substantive counts with which they were charged, except for appellant Vasquez, who was found not guilty on Counts

Four and Five. Appellants' motion for judgment of acquittal or new trial, filed March 13, 1963, was denied by the court on March 18, 1963. On the same day sentence was imposed and appellants gave notice of appeal.

The District Court had jurisdiction to try the case under Title 18, United States Code, Section 3231. This Court has jurisdiction to entertain this appeal pursuant to the provisions of Title 28, United States Code, Sections 1291 and 1294.

II.
STATUTE INVOLVED.

Title 21, United States Code, Section 174, provides in pertinent part:

> "Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. . . .
>
> "Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

III.

STATEMENT OF FACTS.

On October 29, 1962, Agent Joseph Baca of the Federal Bureau of Narcotics accompanied Ronald Varela, a Special Employee of the same Bureau, to the vicinity of Rose Hills housing project in El Sereno, California, after having instructed Varela to introduce him to Ybarra in an attempt to purchase heroin. [R. T. 13, 15.] Agent Baca observed Varela meet Ybarra. [R. T. 13.] After about 15 minutes, Varela rejoined Agent Baca in a Government vehicle and they left the area. [R. T. 16, 21-22.]

On October 30, 1962, Agent Baca and the Special Employee, Varela, drove together to Lombardi's Liquor Store on Huntington Drive in the Los Angeles area. Upon arriving at the liquor store, Agent Baca observed Ybarra pass through the front of the store. Agent Baca and Varela alighted from the car and proceeded toward Ybarra, but the latter walked away from them toward the rear of the store. They waited for a short period and then re-entered their vehicle and drove away. [R. T. 16-17.] Upon passing a market on the corner of Monterey Road and Huntington Drive, Agent Baca observed Ybarra and Torres standing next to a vehicle in the parking lot. He parked the car across the street from the market and Varela got out, crossed the street, and met with the two appellants. After a short period, Varela returned to the Government vehicle. [R. T. 17-19.]

On October 31, 1962, Deputy Sheriff Penn R. Weldon searched Varela, gave him $250, and transported him to North Broadway and Huntington Drive in Los

Angeles. There, Varela boarded a bus which Weldon followed to Huntington Drive and Monterey Road where Varela alighted. [R. T. 27.] Varela walked north on Monterey Road to the Saratoga Bar where he met Ybarra. Together they proceeded to a nearby vacant lot and conversed. Then they walked a short way north on Browne Avenue and were met by Vasquez, who was seated on a blue Honda motorbike. All three conversed, and then Vasquez rode off on the motorbike and Varela and Ybarra walked to the corner of Topaz and Huntington Drive North. A few minutes later, Vasquez reappeared on the motorbike, Varela climbed on the bike behind him and together they rode north on Topaz to Pytites where they turned left and disappeared from view. [R. T. 26-28, 69-70, 104-105.] Ybarra walked west on Huntington Drive and at the corner of Topaz he was greeted by people who said "Hello, Shorty! Hello, Shorty! How are you?" Ybarra smiled in response. [R. T. 70-71.] As Ybarra walked further up Topaz, some children were playing in the street and one said "Hi, Shorty!" He waved in reply. [R. T. 28.]

Approximately ten or fifteen minutes later Deputy Weldon picked up Varela and received from him Exhibit 1. Agent Richard Rock then appeared, searched Varela, obtained Exhibit 1, and later mailed it to the United States Chemist in San Francisco. [R. T. 30, 105-106.]

On November 6, 1962, at approximately 5:30 P.M., narcotic Agent Francis L. Briggs, in the company of Deputy Henry and Agent Rock, searched Varela, supplied him with $875, instructed him to make payment

of $375 for the heroin received on October 31, and to purchase another quantity of heroin and make a partial payment of $500 therefor. [R. T. 191.]

The Special Employee, Varela, was then transported to North Broadway and Mission Road in Los Angeles, where he and Deputy Henry boarded a bus. Agent Briggs followed the bus to Monterey Road and Huntington Drive South where the Deputy and Varela slighted. [R. T. 191.]

Varela crossed the street alone, stood in front of a Chevron Gas Station, and walked back and forth. At the same time, near a driveway at 5420 Huntington Drive South, Ybarra was crouched in the shadows observing Varela. [R. T. 192.] Subsequently, Varela again crossed the street and Ybarra met him. They both entered a '49 or '50 Chevrolet and Ybarra drove on Huntington Drive to Topaz Street where he turned right and was lost from view. [R. T. 107-108.] More than an hour later Agent Briggs picked up Varela and received Exhibit 2 from him. He searched Varela and later mailed the Exhibit to the United States Chemist in San Francisco. [R. T. 193-194.] Both Exhibits 1 and 2 were found to contain heroin. [R. T. 9-10.]

On November 12, 1963, Agent Briggs placed a Fargo transmitting device on the person of Varela who then accompanied Agent Baca by car to Huntington Drive South and Monterey Road where both remained for more than an hour, during which time none of appellants appeared. [R. T. 194-195.] Thereafter Agent Baca and Varela drove into the Rose Hills housing project; Varela left the car, and the following conversa-

tion, in substance, was heard by narcotic officers over the Fargo receiver:

"Varela: (whistle) Hey, Shorty?

Ybarra: Yeah.

Varela: Shorty, what happened to you guys? I was supposed to meet Homer over at the place and you guys didn't show up.

Ybarra: The meeting wasn't for tonight, it's set for tomorrow night.

Varela: No. The last time I saw you we made arrangements to meet tonight.

Ybarra: You are getting your dates mixed up. You should use the number system. Instead of remembering days you should remember the date.

Varela: Did Homer tell you I want to see Hank?

Ybarra: Yes, he did.

Varela: Is he going to meet me tomorrow night?

Ybarra: I don't know.

Varela: Well, I'm gonna have four or five thousand dollars and I want to buy a lot of stuff.

Ybarra: Crazy.

Varela: Will this transaction have to go like the last time? I don't want to be walking all over the hills because I might be arrested.

Ybarra: I think it will be a little bit different. How did you get here tonight?

Varela: My partner drove me up here.

Ybarra: Where is he?

Varela: He is parked down the street.

Ybarra: We told you never to bring anyone over.

Varela: The only reason he is here with me is so I'll have a way to get here. He doesn't necessarily want to meet you either.

Ybarra: We don't want anyone around. If anyone sees any of us we are through and won't deal with you any longer. Do you want to pick up anything now? If you can wait ten minutes I can get you something now.

Varela: I've got to leave to take my mother to the hospital. I can't buy any narcotics now. Can we change the meeting spot to some other place?

Ybarra: The original spot is fine; there is nothing wrong with it.

Varela: I don't want to take a chance of getting arrested. The area has a notorious reputation for narcotic peddlers and I might be arrested walking around there.

Ybarra: If you are picked up or stopped by the police, tell them you just got out of school.

Varela: I am quite certain I don't look like a schoolboy.

Ybarra: Come back tomorrow as we agreed, but be careful. It is nearing Christmas and the secret grand jury indictments will be out soon. Make sure you are not followed and don't bring anyone else." [R. T. 33-35, 161-164, 195-198.]

The next day, November 13, 1962, Varela was escorted by narcotic officers to Huntington Drive South and Esmeralda. After walking about this area Varela was met by Ybarra in the vicinity of the Chevron Gas Station and they conversed for 15 or 20 minutes. Varela was wearing a Fargo transmitter but officers could

not obtain any reception therefrom. [R. T. 36, 198-199.]

On November 14, 1963, Varela met narcotics officers who searched him and furnished him $500. Agent Rock instructed him not to part with this money unless he was able to meet Torres. [R. T. 109.] Thereafter, Varela was transported to the vicinity of Huntington Drive South and Turquoise Street, where he got out of the car. Vasquez then appeared on the blue Honda motorbike and Varela got on the rear. [R. T. 37, 110.] Followed by narcotic officers in a 1959 black Ford Ranchero, Vasquez and Varela drove in a circuitous route from Huntington Drive South to Monterey Road, up Monterey Road to Browne, down Browne to McKenzie to Florizel, west on Florizel to Boundary, south on Boundary to Mercury, on Mercury back to Monterey Road to Armour to a small grocery store which is located at the latter intersection. [R. T. 73-74.]

Vasquez and Varela entered the store, came out and drank from a bottle. Both got back on the motorbike and proceeded in a weaving fashion to the top of a steep hill on Armour street where it joins Florizel. From the top of this hill, one could see the route the Ford Ranchero had taken in following the motorbike. [R. T. 74-75, 110-111, 138-139.] About 45 minutes later, Varela was picked up by Sergeant Cook of the Los Angeles County Sheriff's Department. [R. T. 139.] The narcotics officers never saw the $500 again. [R. T. 128, lines 17, 18.]

On November 16, 1962, a Fargo transmitter was placed on Varela's person and he was driven to the corner of Thelma and Huntington Drive. Here, he got

out of the car and walked to Lombardi's Liquor Store. [R. T. 140, 199.] Narcotics officers saw appellants Ybarra and Torres come out of the store and walk to the parking lot at the rear. [R. T. 111.] Varela entered the store and as he came back out he was met by Ybarra who said: "Go to the rear of the liquor store and wait." Varela walked away; Ybarra stood momentarily and then followed Varela to the rear of the store. [R. T. 202.] Thereafter, Varela and appellants Torres, Ybarra, and Vasquez were observed to be standing behind the liquor store [R. T. 112-113], and the following conversation, in substance, was overheard by narcotics officers over their Fargo receivers:

"Varela: Hello, Homer, how are you?

Vasquez: Are you sure you weren't followed tonight?

Varella: I am sure I wasn't followed; I took precautions. Besides, I am going to cool my activities for a couple of weeks.

Torres: Hi, Ronnie.

Varela: Hi, Hank. What's happening?

Torres: Are you sure you haven't got a radio? (Officer hears a rustling of clothes.)

Varela: Oh, c'mon, man, I don't have a radio on. What do you take me for. You hurt my feelings by suggesting such a thing.

Torres: Well, we have to be careful. Are you sure you weren't followed tonight like you were two nights ago when you came up here?

Varela: I'm sure I wasn't followed. I got in and out of several cabs and kept watching behind me.

Torres: I'm not sure whether the guys in the Ranchero the other night were the 'heat' or not, but we watched them three or four hours after you left the area. They might have been guys who gave you money and then didn't trust you and followed you to see where you were going with it.

Varela: No, that couldn't be. I'm only dealing with three people who I know quite well and trust and have no reason to think that they would follow me.

Torres: Who is this partner of yours that you keep trying to bring up here?

Varela: He is a man I have know for 14 years. We are close friends and I am sure he can be trusted.

Torres: You can't be sure of anybody. I don't want to meet him and you can stop bringing him up here. For all you know, he might be in jail now in Oxnard rather than with his family.

Varela: No, he is in Oxnard because his mother just died and his father had a nervous breakdown. He will be back in town shortly and is expected to inherit a large sum of money from his mother's estate which we intend to put into the narcotic traffic. Can you get me 40 pieces of stuff, and what kind of price can I get on it?

Torres: $225 per ounce.

Varela: Can't I get it cheaper than that?

Torres: No, not cheaper than $225 up here. If you want it any cheaper I can meet you in Mexico and take care of you down there.

Varela: That would mean I would have to take the risk of bringing the stuff across the border, or find somebody I could trust to bring it back.

Torres: That's right. That's the reason for the price of $225.

Varela: Are you sure I can't get it any cheaper?

Torres: Look, Ronnie, if you can find stuff as good as mine any place in town at a cheaper price, you tell me and I'll buy all you can get.

Varela: (laughs) I'll come back up here in two weeks and I'll have $4500 or $9000 for stuff, and when I come back I'll tell you how the deal is going to go.

Torres: Look, Ronnie, remember this. You're buying and we're selling and I'll tell you how the deal is going to go. It's not going to go your way at all.

Varela: $9000 is a lot of money. I don't like to bring it up here in the Rose Hills. You know what a bad reputation this area has.

Torres: Yeah. Rose Hills is a legend. The bulls would love to bust it, but they never will.

Varela: (laughs) But, $9000 is still a lot of money. It's almost two years' wages.

Torres: It is for some people, but to us it's only a little bit.

Varela: Okay, I'll come over here and give you the money.

Torres: No. You'll give it to either Homer or Shorty; that's how it's gonna go or else we are not gonna do any business.

Varela: Okay.

Torres: Do you have the $100 you owe us?

Varela: No.

Torres: Do you remember the first time you come up here?

Varela: Yes.

Torres: Remember, I told you I didn't want to sell any less than three ounces at a time?

Varela: That's right.

Torres: You came up here with $250, we gave you stuff and credit for the other and we thought that you'd be able to come up here and pick up at least that much on your own. From now on, bring the money when you come up here and we'll give you the stuff. We'll have to do business that way. No more credit.

Varela: Okay.

Torres: We trust you, Ronnie. If we didn't trust you you'd never have gotten anything. I told Homer to go ahead and give you the stuff the first time. Isn't that right?

Vasquez: Yeah.

Varela: I know you trust me, Hank, and that you are not going to mess me around.

Torres: Be careful of who you give your money to. Give it to either Shorty or Homer. Some punks come up here looking for me and give their money to other people and don't get any heroin.

Varela: All right. I'll see you here two weeks from tonight. It'll be on a Friday.

Torres: All right, at 9:00 o'clock.

Varela: That'll be fine.

Torres: Well, how about 7:00 o'clock? 9:00 o'clock is kind of late.

Varela: Well, 7:00's fine with me. I only came at 9:00 because that's the time you told me to be here." [R. T. 141-146; 164-168; 201-207.]

While the above conversation was in progress, the three appellants and Varela were observed to be standing together behind the liquor store. [R. T. 39-40, 76, 112.]

After the conversation concluded, Torres and Ybarra walked through the alley behind the liquor store to Monterey Road. [R. T. 209.] None of appellants kept their scheduled appointment with Varela on November 30, 1962. [R. T. 208.] Sometime later, Varela met his death from causes not attributable to appellants, so far as the Government knows. [R. T. 271.]

On the witness stand Torres denied that he was ever behind Lombardi's Liquor Store with Vasquez, Ybarra, and Varela. [R. T. 257.] He also denied that anyone ever called him "Hank" or that he knew anyone named "Ronnie" or Varela. [R. T. 249, 252.] Torres said he had never called Vasquez "Homer" or heard him so referred to [R. T. 253], and that nobody called Ybarra "Shorty." [R. T. 254.] He denied participating in any conversation regarding narcotics, or in any narcotic transaction. [R. T. 249, 250-251.]

THE QUESTION PRESENTED.

The Sole Question Presented by this Appeal is Whether the Evidence was Sufficient to Sustain the Convictions.

ARGUMENT.

In determining the sufficiency of the evidence on appeal, the evidence is viewed in the light most favorable to the Government, including the reasonable inferences to be drawn therefrom. *Glasser v. United States,* 315 U. S. 60 (1942); *Teasley v. United States,* 292 F. 2d 460 (9 Cir. 1961); *Schino v. United States,* 209 F. 2d 67 (9 Cir. 1954).

Appellants ignore the above principle of law and apparently seek to have this court pass upon the credibility of Government witnesses insofar as certain voice identifications are concerned. Agent Briggs identified voices heard over a radio receiver as those of Varela and appellants Ybarra and Torres. He also heard a fourth voice at a time when only the above three persons and appellant Vasquez were present, so that the reasonable inference could be drawn that the fourth voice was that of Vasquez. Agent Briggs was familiar with Varela's voice, he *saw* Ybarra at the same time he heard his voice over the radio, and Torres spoke in a distinctive, slow monotone that was easily remembered. The trial judge heard Agent Briggs testify, listened to Torres' voice from the witness stand, and concluded that the voices heard over the radio receiver were those of Varela and the three appellants. On this appeal, these facts are to be taken as the trial court found them. We turn from the preliminary matter of what the evidence is, to the question of whether the evidence is sufficient to sustain the findings of guilt.

The Substantive Counts.

The three essential elements required to be proved in order to establish the offenses charged in Counts II through V are: (1) the acts of selling or concealing a narcotic drug which has been imported into the United States contrary to law, or the facilitating of such sale or concealment, (2) doing such acts knowingly and fraudulently and unlawfully, and (3) knowledge of the accused that the narcotic drug had been imported into the United States contrary to law. Elements 1 and 3 appear to be the only ones concerning which a question is raised; consequently only these need be discussed.

The acts of selling and concealing heroin, or the facilitation of such acts, is established by the following evidence: after contacting appellants, and being instructed to purchase heroin from them, Varela was furnished $250 to purchase narcotics on October 31, 1962. On that date he met Ybarra and Vasquez and within ten or fifteen minutes after disappearing with Vasquez, he turned approximately three ounces of narcotics over to officers. Later, Torres was overheard to remark that the first time Varela bought from appellants he came with only $250 and they gave him narcotics on credit. Torres also said that he told Vasquez to give Varela the heroin, and Vasquez acknowledged this. Ybarra was present with Vasquez and Torres while they spoke.

On November 6, 1962, Varela was supplied with $875 and instructed to pay $375 for the heroin received on October 31st and to make a partial payment of $500 on another purchase of narcotics. Varela met Ybarra and they were lost from view for over an hour, after which Varela returned with narcotics. Later, Ybarra was overheard to discuss this transaction with Varela at which time Varela told Ybarra that he didn't want to have to walk all over the hills in future transactions as he had the last time. Also later, Torres was overheard to mention that Varela owed $100 on the first transaction of three ounces, thus indicating that he received the original $250 and the $375 paid on November 6th.

The knowledge of appellant that the heroin they sold was imported into the United States contrary to law is established in two ways: (1) the statutory presump-

tion arising from unexplained possession of heroin, and (2) direct evidence of the required knowledge.

It is well established that the possession creating a presumption of knowledge of illegal importation of heroin need not be "actual" possession. A person who, although not in actual possession, knowingly has the power and the intention at a given time to exercise dominion or control over heroin, either directly or through another person or persons, is then in constructive "possession" of it within the meaning of 21 U. S. C. Section 174. *Hernandez v. United States,* 300 F. 2d 14 (9 Cir. 1962); *United States v. Cohen,* 124 F. 2d 164 (2 Cir. 1941).

The constructive possession necessary for the statutory presumption of illegal importation of narcotics may be proved by direct or circumstantial evidence. *Teasley v. United States,* 292 F. 2d 460 (9 Cir. 1961). From the evidence that appellants did deliver and cause the delivery of heroin, it is plain that they intentionally exercised dominion and control over it. Even proof of the furnishing of information as to where heroin might be picked up has been viewed as some evidence of constructive possession. *White v. United States,* 294 F. 2d 952 (9 Cir. 1961).

In any event, the Government need not rely on the statutory presumption to supply the element of knowledge that the heroin was illegally imported, since Torres, in the presence of Ybarra and Vasquez, was heard to state that the cheapest price for which he would sell the narcotic was $225 per ounce, and that the reason for this price was the risk involved in bringing it across the border from Mexico. Clearer evidence of the required knowledge can hardly be imagined.

From the above summary, it is plain that the essential elements of the substantive offenses were all supplied by the Government's proof and appellants' convictions thereon are supported by sufficient evidence.

The Conspiracy Count.

The elements required to be proved in order to establish the conspiracy charged in Count I of the indictment are: (1) That the conspiracy described was formed and existed at about the time alleged, and that the appellants were knowing and willful members thereof, (2) That one of the conspirators thereafter knowingly committed at least one of the overt acts charged in the indictment, and (3) That such overt act was committed in furtherance of some object or purpose of the conspiracy as charged.

Appellants contend that the evidence is insufficient to establish the existence of a combination or agreement among appellants, or that such combination, if established, related only to the future and no overt act was committed in furtherance thereof. (Appellants' Brief, pp. 12-13.) The evidence as to a combination among appellants consists of Government agents' observation of them in their dealings with Varela, and appellants' own statements concerning their transactions with Varela and others. It should be noted that these remarks related to transactions occurring in the *past* as well as those planned for the future. It has been said that a "conspiracy" is usually established by a number of apparently disconnected circumstances which when taken together throw light on whether the accused have an understanding or are in common agreement. *United States v. Glasser,* 116 F. 2d 690 (7 Cir.

1941), modified on other grounds 315 U. S. 60 (1942). The existence of agreement or joint assent of minds may be inferred from the evidence taken as a whole, and no direct proof of agreement is required. *McClanahan v. United States,* 230 F. 2d 919 (3 Cir. 1956); *United States v. Pagano,* 224 F. 2d 682 (2 Cir. 1955). The evidence shows that the requirement of proof of combination or agreement was met. Appellants urge that this element cannot be established as to one conspirator by declarations of co-conspirators made in his absence. In this regard it should be noted that the declaration is usable against the declarant in any event, and that most of the declarations occurred when all appellants were present.

The second element—the commission of at least one overt act—is supplied by proof of the meeting of appellants and Varela on November 16, 1962. The remaining three overt acts charged in the indictment were also established by the evidence.

The requirement that appellants be shown to have had as their object the sale or concealment, or facilitation thereof, of heroin with knowledge that it has been illegally imported into the United States, has been adequately met by the evidence of appellants' actual sales in the past and their plans for future ones. Their knowledge that the heroin was imported into the United States unlawfully is established by the same direct evidence and statutory presumption mentioned above in regard to the substantive counts.

When considered as a whole, the evidence sustaining appellants' conviction is not merely sufficient, it is overwhelming.

IV.

CONCLUSION.

For the reasons stated above, the judgment of the District Court should be affirmed.

Respectfully submitted,

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Certificate.

I certify that, in connection with the preparation of this Brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing Brief is in full compliance with those rules.

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No. 18703

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

vs.

CRUZ YBARRA, HERMAN VASQUEZ, FRANK TORRES,

Appellants.

ARGUMENT IN REPLY TO APPELLEE'S BRIEF.

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Appellants.

ARGUMENT IN REPLY TO APPELLEE'S BRIEF.

In opposition to Appellee's brief, appellants contend that the facts were overwhelmingly insufficient, particularly in respect to the identification made by Agent Briggs of the voices of the appellants.

Agent Briggs identified appellant Frank Torres' voice which apparently was a necessary link in the connection of facts to support a judgment of conviction. There was no other identification of Frank Torres' voice although overheard by other witnesses.

Agent Briggs testified that it was his opinion the voice heard on the conversation of November 16, 1962, was that of Frank Torres with the qualification that he could possibly be in error [R. T. 219]. Agent Briggs testified that he did not know of the presence of Frank Torres in the parking lot at the time of the conversation on November 16, 1962, but was later so advised by other officers [R. T. 224]. Agent Briggs testified he did not

hear the voice he identified as Frank Torres until December 16, 1962, one month later [R. T. 227]. He further testified that he had never heard Frank Torres speak through a recorder [R. T. 228]. Admittedly Agent Briggs had never previously met with the appellant, Frank Torres [R. T. 235].

Since the conversation of November 16, 1962, is crucial in connecting Frank Torres to the charges set forth in the indictment it is of vital concern to consider the participants in the conversation and their identification.

Appellants contend that the facts are insufficient for the proper identification of the appellants. It would appear unlikely that a person could listen to another's voice over a radio receiver, without previous knowledge of his presence nor familiarity with the voice, having never heard it before, and not hearing that voice for a period of one month subsequently, could sufficiently establish a reasonable basis for the opinion of Agent Briggs.

Appellee set forth on page 12 of Appellee's Brief that appellant Vasquez responded to a statement with the word "yeah". Appellants contend that the identification of a voice is overwhelmingly improbable on the basis of hearing a person over a radio receiver recite the word "yeah".

The Government is taking the position that Homer is the appellant Vasquez, but overlooks the testimony of officer Velasquez wherein he testified that Homer is Shorty [R. T. 179].

Appellee argues that reference was made to a previous transaction and this was with reference to a certain amount of money which was introduced as evidence of

the transaction on October 31, 1962. Without the testimony of the special employee it would be impossible to conclude that this alleged transaction was all that had ever occurred, particularly in reference to any other dealings either a short period of time preceding October 31, 1962, or possibly to the extent of a number of years.

Appellee contends that the appellants were all present during the conversation of November 16, 1962, and there existed an acknowledgement of a sale transaction together with the indication that the conversation was conducted with the complete understanding of all present.

This position is inconsistent with the testimony by officer Weldon, that he had observed appellant Ybarra pacing up and down in the alley during this time [R. T. 39]. Agent Niblo testified that he had observed appellant Vasquez with his bright red shirt pacing back and forth in the alley [R. T. 82]. Agent Rock testified that he observed appellant Ybarra from time to time walk up to the end of the alley-way and again disappear from view [R. T. 112].

There is no evidence specifically to a definite price paid or received for any transaction, nor is the evidence sufficient to establish that $250.00 was paid to anyone on October 31, 1962.

Appellants contend that any reference to future transaction which involved bringing narcotics across the border from Mexico is insufficient to establish knowledge that narcotics involved in specific earlier transactions had been knowingly imported illegally.

Appellant Frank Torres was not seen by anyone on October 31, 1962, and November 6, 1962, and without a substantial showing of specification to these transac-

tions it would be exceedingly improbable to sufficiently establish any connection therein on his part.

Without the establishment and proof of an existing conspiracy previous to any conversation on November 16, 1962, the judgment of conviction in respect to the conspiracy should be reversed, since there was no subsequent overt acts on the part of any of the conspirators after November 16, 1962.

The special employee was identified as Ronald Varela [R. T. 13], who was under indictment at the time of the transactions involved [R. T. 118]. Agent Rock testified that the special employee was a narcotic addict based upon his personal knowledge [R. T. 118]. The death of the special employee was without cause of appellants [R. T. 270, 271].

Instructions had been given to the special employee and particularly the instruction to remain within view or sight of the officers [R. T. 36, 210]. The evidence discloses that the special employee had left the sight of the officers on both transactions of October 31, 1962, and November 6, 1962. He was furnished with $500.00 on November 14, 1962, which was never seen again, and for which no narcotic was produced, unexplained.

Without the testimony of the special employee and an opportunity by the appellants to cross-examine such testimony it would be delictately dangerous in the acceptance of such facts in the establishment of substantial proof of guilt.

Respectfully submitted,

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By NORMAN J. KAPLAN,
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Certificate.

I certify that, in connection with the preparation of this brief, I have examained Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

NORMAN J. KAPLAN

No. 18704

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

DISTRICT DIRECTOR OF INTERNAL REVENUE,

Appellant,

vs.

LONG BEACH JUNIOR CHAMBER OF COMMERCE,

Appellee.

On Appeal From the Judgment of the United States District Court for the Southern District of California

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BRIEF FOR THE APPELLANT.

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Index

TABLE OF AUTHORITIES CITED

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Appellee.

On Appeal From the Judgment of the United States District Court for the Southern District of California.

BRIEF FOR THE APPELLANT.

Opinion Below.

The District Court wrote no opinion and its findings of fact and conclusions of law (R. 14-19) have not been officially reported.

Jurisdiction.

This appeal involves the federal admissions tax. On October 16, 1959, taxpayer paid $732.84 in federal admissions tax to the Commissioner of Internal Revenue relating to performances during the period January 29, 1959 to February 3, 1959. (R. 17-18.) A claim for refund of this amount was filed by taxpayer on April 7, 1960. (R. 18.) More than six months having elapsed since the filing of its claim, taxpayer brought a

timely suit for refund in the District Court. (R. 18.) Jurisdiction was conferred upon the District Court by 28 U.S.C., Section 1346(a)(1). The judgment of the District Court allowing taxpayer's claim in full was entered on January 15, 1963. (R. 21.) Notice of appeal was filed on March 15, 1963. (R. 21.) Jurisdiction is conferred on this Court by 28 U.S.C., Section 1291.

Questions Presented.

Whether the taxpayer, a chamber of commerce, is a "civic or community membership association" within the meaning of Section 4233(a)(3) of the Internal Revenue Code of 1954, so as to qualify for exemption from the admissions tax imposed by Section 4231.

Statute Involved.

Internal Revenue Code of 1954:

SEC. 4231 [as amended by Sec. 131(a) of the Excise Tax Technical Changes Act of 1958, P.L. 85-859, 72 Stat. 1275]. IMPOSITION OF TAX.

There is hereby imposed:

(1) *General.*—

(A) *Single admission.*—A tax of 1 cent for each 10 cents or major fraction thereof of the amount in excess of $1 paid for admission to any place.

(B) *Season ticket.*—In the case of a season ticket or subscription for admission to any place, a tax of 1 cent for each 10 cents or major fraction thereof of the amount paid for such season ticket or subscription which is in excess of $1 multiplied by the number of admissions provided by such season ticket or subscription.

(C) *By whom paid.*—The taxes imposed under subparagraphs (A) and (B) shall be paid by the person paying for the admission

* * *

(26 U.S.C. 1958 ed., Sec. 4231.)

SEC. 4233 [as amended by Sec. 1 of the Act of April 16, 1959, P.L. 85-380, 72 Stat. 88]. EXEMPTIONS.

(a) *Allowance.*—No tax shall be imposed under section 4231 in respect of:

* * *

(3) *Certain musical or dramatic performances.*—Any admissions to musical or dramatic performances conducted by a civic or community membership association if no part of the net earnings thereof inures to the benefit of any stockholders or members of such association.

* * *

(26 U.S.C. 1958 ed., Sec. 4233.)

Statement.

All of the facts in this case were stipulated. (R. 10-14.) Pursuant to that stipulation, the District Court made findings of fact as follows (R. 14-18):

Taxpayer is a citizen of the United States and resides in the County of Los Angeles, in the Central Division of the Southern District of California. (R. 15.)

The Long Beach Junior Chamber of Commerce is a corporation duly organized and authorized to operate under the laws of the State of California and authorized to do business in the State of California, having its principal office in the County of Los Angeles, in the Cen-

tral Division of the Southern District of California. (R. 15.)

The purpose of the Long Beach Junior Chamber of Commerce as set forth in the Constitution and By-Laws of the chamber of commerce is as follows (R. 15-16):

> Section 1. The purpose of this organiztion shall be to provide the younger business and professional men of the City of Long Beach a medium for training in citizenship and Chamber of Commerce work, to promote and publicize the civic, industrial, recreational, and educational activities of the community, to secure and disseminate accurate information relating thereto, to oppose legislation unfavorable thereto, and to promote and support legislation favorable thereto.
>
> Section 2. The organization shall be non-partisan in all respects and shall not at any time endorse any candidate or individual for public office; and it shall be the policy of this organization to refrain from endorsing or opposing any and all definitely partisan measures.

The activities of the Long Beach Junior Chamber of Commerce include the following (R. 16-17):

1. Boys Junior Olympics—An annual boys track meet sponsored by taxpayer.

2. Wings Over the World—An activity designed to publicize aviation.

3. Christmas Tree Lighting Contest.

4. Operation Phone Santa—Members of taxpayer organization take calls from children to Santa Claus during the Christmas season.

5. My True Security—A contest in which a prize is awarded to the best essay on an individual's true security.

6. Good Citizenship Awards.

7. The Miss Welcome to Long Beach Contest—A contest to determine which girl will welcome beauty contestants to Long Beach for the Miss Universe Contest.

8. Christmas Cheer Clearing House—Food and gifts are gathered and distributed to needy families during Christmas season.

9. The City of Long Beach and other local governmental agencies have requested that the taxpayer conduct social surveys in the area, which taxpayer has done.

10. The Long Beach Chamber of Commerce has sponsored programs to combat juvenile delinquency such as having the Wink Martindale Television Show held at the Long Beach Municipal Auditorium for a period of several weeks. These shows were well publicized in Long Beach schools prior to their showing.

11. The following entertainers have appeared in shows sponsored by taxpayer; Duke Ellington, Fred Waring, Spade Cooley and others.

In the conducting and performance of the foregoing programs no profit, commission or bonus has inured to the benefit of any member of the Long Beach Junior Chamber of Commerce. (R. 17.)

Prior to the taxable period the taxpayer, Long Beach Junior Chamber of Commerce, had applied for and obtained an exemption under Section 101(7) of the 1939 Code, now Section 501(c)(6) of the 1954 Code. (R. 17.)

On January 29 and 30, and February 1, 2 and 3 of 1959, the taxpayer sponsored at the Long Beach California Municipal Auditorium an American version of the Oberammergau Passion Play. The performance was presented by a professional theatrical group, Consolidated Concerts Corporation, 30 Rockefeller Plaza, New York, New York, for a consideration of $7,500. The net proceeds, if any, after payment of this consideration and other necessary expenses would go to the Long Beach Junior Chamber of Commerce "Youth Activities Fund." (R. 17-18.)

The officers of the Long Beach Junior Chamber of Commerce upon the advice of legal counsel set aside a portion of the monies received from proceeds of ticket sales for an admissions tax. This was done under advisement by the Internal Revenue Service that the organization would be liable for the tax. The sum of $732.84 was paid under protest to the Internal Revenue Service on October 16, 1959, and a claim for refund of that sum was filed by the taxpayer on April 7, 1960. More than six months have elapsed since the filing of the claim for refund. (R. 18.)

Based on these facts, the District Court concluded that taxpayer was a "civic or community membership association" within the meaning of Section 4233(a)(3) of the 1954 Code, and that, as such, it was exempt from the admissions tax in respect to the sale of tickets to performances of the Oberammergau Passion Play. (R. 18-19.) Judgment was entered for taxpayer in the amount of $732.84 (R. 20-21), and it is from that judgment that the instant appeal is prosecuted.

Specification of Errors Relied Upon.

1. The District Court erred as a matter of law in concluding that taxpayer was a "civic or community membership association" within the meaning of Section 4233(a)(3) of the 1954 Code.

2. The District Court consequently erred as a matter of law in concluding that taxpayer was exempt from admissions tax under Section 4233(a)(3) in respect to the sale of tickets to a play which it sponsored.

3. The District Court erred in entering judgment for taxpayer.

Summary of Argument.

The District Court clearly erred in holding that the taxpayer is a "civic or community membership association" within the meaning of Section 4233(a)(3) of the Internal Revenue Code of 1954, which exempts certain "musical or dramatic performances conducted" by such associations from the admissions tax imposed by Section 4231. Tax exemption provisions must of course be strictly construed. Read in the light of its legislative history, and in conjunction with cognate provisions of the Internal Revenue Code, the term "civic or community membership association" as used in Section 4233(a)(3) has reference only to those non-profit membership associations which are organized and operated primarily for the purpose of conducting musical or dramatic performances for the cultural benefit of the members of the association, such as civic music associations, whose members pay annual dues for the right to attend a series of concerts. But the exemption does not apply to every type of civic association which sponsors a musical or dramatic performance, albeit the in-

come derived by the association from such activity is used to further the general civic or community purposes of the association. Congress has expressly exempted "civic leagues" and "chambers of commerce" from the income tax (Section 501(c)(4) and (6)). Had it intended also to exempt dramatic performances sponsored by such organizations from the admissions tax, it could readily and simply have said so.

It is plain from the undisputed facts in this case that the taxpayer association does not qualify as a "civic or community membership association," within the purview of Section 4233(a)(3). The taxpayer's primary purpose and activities were not those of a cultural membership association, but those of a typical chamber of commerce; and the dramatic performance for which it here seeks exemption from the admissions tax was a performance to which the non-membership public was invited and charged an admission price, not one conducted for the benefit of the taxpayer's membership. In holding that the performance in question was immune from the admissions tax, the District Court has extended the exemption provision of Section 4233(a)(3) far beyond the narrow scope contemplated by Congress in enacting that section. The decision below accords taxpayer an unfair competitive advantage, not intended by Congress, over other organizations conducting dramatic performances for public audiences and subject to the admissions tax.

ARGUMENT.

The District Court Erred in Holding That Taxpayer Was a "Civic or Community Membership Association" Within the Meaning of Section 4233(a)(3) of the 1954 Code.

A. Introductory.

This appeal turns on a narrow question of statutory interpretation. Section 4233(a)(3) of the 1954 Code *supra,* exempts from the admissions tax certain "musical or dramatic performances conducted by a civic or community membership association if no part of the net earnings thereof inures to the benefit of any stockholders or members of such association." Taxpayer, the Long Beach Junior Chamber of Commerce, maintained in the District Court that a dramatic performance by paid professional actors under its sponsorship was exempt from admissions tax under Section 4233 (a)(3). The District Court, without opinion, concluded that taxpayer was correct and entered judgment for taxpayer in the amount claimed.

Presumably, the District Court agreed with taxpayer's contention that under the "plain meaning" of Section 4233(a)(3), a chamber of commerce qualifies as a "civic or community membership association." Assuredly, if words in a statute were to be interpreted divorced from context and without regard to the purpose of the statute revealed in the legislative history, there would be no basis for this appeal. Upon close examination of all the terms used in Section 4233(a)(3) and its relation to other exemption provisions, however,

doubts arise as to the propriety of a broad construction.[1] Turning to the extensive legislative history (1936-1958) of Section 4233(a), these doubts are readily confirmed. What emerges is a clearly expressed Congressional purpose to limit the exemption to organizations primarily, if not exclusively, devoted to musical or dramatic productions for the benefit of their members. Any organization with other primary purposes, merely sponsoring musical or dramatic performances for fund-raising or other incidental purposes, cannot qualify as a "civic or community membership association" within the meaning of Section 4233(a)(3).

The primary purposes and functions of the Long Beach Junior Chamber of Commerce are matters not in dispute. As its by-laws reveal and its activities confirm, taxpayer promotes and publicizes a particular community. (R. 15-17.) These basic objectives are furthered in many ways, ranging from social surveys to sponsorship of such miscellaneous events as an essay contest, a Christmas tree lighting contest, a beauty contest and a variety show. (R. 16-17.) This case involves the admissions tax which taxpayer paid over in connection with its sponsorship of a version of the Oberammergau Passion Play performed by professional actors from New York. (R. 17-18.) On these facts, the Long Beach Junior Chamber of Commerce may qualify as a "civic or community membership associa-

[1]It is a familiar rule of statutory construction that tax exemptions are matters of legislative grace and are therefore to be strictly construed. *Better Business Bureau v. United States,* 326 U. S. 279; *Cornell v. Coyne,* 192 U. S. 418, 431-432; *Helvering v. Northwest Steel Mills,* 311 U. S. 46, 49; *Helvering v. Ohio Leather Co.,* 317 U. S. 102, 106; *United States v. Stewart,* 311 U. S. 60, 71; *Lindstrom v. Commissioner,* 149 F. 2d 344, 346 (C. A. 9th).

tion" in a broad sense, but it clearly is not an organization primarily devoted to conducting musical or dramatic performances for its members, and it is only the latter, we contend, who qualify under Section 4233(a)(3).

B. The Asserted "Plain Meaning" of Section 4233(a)(3).

In the construction of tax statutes, "most words admit of different shades of meaning, susceptible of being expanded or abridged to conform to the sense in which they are used." *Helvering v. Stockholms etc. Bank,* 293 U.S. 84, 87. "The word to be defined, in common with words generally, will have a color and a context that will vary with the setting." *Hawks v. Hamill,* 288 U.S. 52, 57.

Whether the term "civic or community membership association" calls for a broad or a narrow interpretation should be analyzed preliminarily in the context of the sentence of which it is a part. First, Section 4233(a)(3) does not apply to performances sponsored by civic or community membership associations, but only to performances "conducted" by such associations. The use of the more restricted term "conducted" indicates a closer relationship between the production and the association than mere sponsorship. Second, the exemption applies only to a civic or community "membership" association. In light of the fact that all associations have members, the addition of the adjective "membership" clearly implies that some civic or community associations are not intended to be exempt.[2] Although the full significance of these terms of limitation is to

[2]Significantly, Section 4233 exempts a wide variety of associations, but the term "membership association" appears only in Section 4233(a)(3).

be grasped only upon examination of the legislative history, the least which can be claimed for them at face value is a warning that Section 4233(a)(3) is a narrow-gauge exemption provision not susceptible of an easy, broad construction.

Moreover, in the process of ascertaining legislative intent, "There is need to keep in view also the structure of the statute, and the relation, physical and logical, between its several parts." *Duparquet Co. v. Evans,* 297 U.S. 216, 218. Under Section 4233(a)(7) (Appendix, *infra*), there is exempted "Any admission to an amateur performance presented and performed by a civic or community theatre group or organization * * *." An amateur theatrical production of a community theatre group qualifies easily as a dramatic performance "conducted" by a "civic or community membership association" if those terms as they appear in Section 4233(a)(3) are given a broad interpretation. The fact that Congress regards as necessary a special provision for those little theatre groups consequently gives rise to the inference that the Section 4233(a)(3) exemption is considerably less broad than the decision of the District Court would indicate.[3]

Moving over to the provisions exempting certain organizations from the payment of income tax, it should be noted first that Section 501(c)(6) of the 1954 Code (Appendix, *infra*) exempts "Business leagues, chambers of commerce, real estate boards, or boards of trade." It is under this provision that the Long

---

[3]If the District Court's sweeping interpretation of Section 4233(a)(3) were proper, Congress logically should have dropped Section 4233(a)(7) in 1958 when it extended the scope of the former provision to "dramatic performances". Act of April 16, 1958, P. L. 85-380, 72 Stat. 88, Secs. 1 and 2.

Beach Junior Chamber of Commerce claims exemption from income tax. (R. 17.) The exemption of "Civic leagues" is separately provided for in Section 501(c)(4) (Appendix, *infra*). Although it is not suggested that there is any one-for-one correspondence between the "Civic leagues" in Section 501(c)(4) and the "civic or community membership association" in Section 4233(a)(3), it is at least relevant that Congress considered "chambers of commerce" as not included in the term "Civic leagues" and that when Congress intended to exempt chambers of commerce it referred to them by name. Whether this comparison of the terms and structure of the income tax provisions with Section 4233(a)(3) is regarded as persuasive or barely more than a straw in the wind, it does militate against a broad and flexible interpretation of the admissions tax exemption provision.

Taking all of the foregoing elements into account, it is sufficiently clear from text and context that the term "civic or community membership association" as it appears in Section 4233(a)(3) is not the proper object of any "plain meaning" approach. It is in the legislative history of Section 4233(a)(3), to which we next turn, that the key to a proper interpretation is to be found.

C. The Proper Interpretation of Section 4233(a)(3).

Regardless of whether taxpayer is correct in asserting that Section 4233(a)(3) has a "plain meaning," the Supreme Court has rejected time after time "a literal interpretation dogma which withholds from the courts available information for reaching a correct conclusion." *United States v. America Trucking Assns.*, 310 U.S. 534, 544; *Lynch v. Overholser,* 369 U.S.

705, 710; *Ozawa v. United States,* 260 U.S. 178, 194. "It would be anomalous to close our minds to persuasive evidence of intention on the ground that reasonable men could not differ as to the meaning of the words." *United States v. Dickerson,* 310 U.S. 554, 562. More pointedly, "If Congress has been accustomed to use a certain phrase with a more limited meaning than might be attributed to it by common practice, it would be arbitrary to refuse to consider that fact when we come to interpret a statute." *Boston Sand Co. v. United States,* 278 U.S. 41, 48.

Upon examination of the legislative history of Section 4233(a)(3), it is immediately apparent that the phrase "civic or community membership association" is a prime example of words used by Congress with a more limited meaning than they normally would have. The legislative materials, particularly the Committee Reports—"congressional purpose explicitly revealed" (*Commissioner v. Bilder,* 369 U.S. 499, 502)—show that the only organizations intended to be exempt are those devoted primarily, if not exclusively, to conducting musical or dramatic performances for their members. The evidence is all one way; there is no basis for any inference that Congress wished to exempt associations with other primary purposes, sponsoring musical or dramatic performances for fund-raising or other incidental purposes. Originally—in 1936—Congress desired to exempt only concert courses or series which were conducted by such membership associations as orchestras and choral societies. Although the scope of the exemption was increased by administrative interpretation and by Congress in 1958 (to include "musical and dramatic performances"), the touchstone of the

exemption has remained the same, i.e., the nature of the organization involved. Consistent with this proposition, Section 4233(a)(3) presently contains the same words of limitation (e.g., "conducted" and "membership") with which it began.

Briefly reviewing the legislative history, Section 500(b) of the Revenue Act of 1926, c. 27, 44 Stat. 9, as amended, exempted from the admissions tax proceeds which inured to the benefit of, among others, "societies or organizations conducted for the sole purpose of maintaining symphony orchestras * * *." This provision was amended by Section 801 of the Revenue Act of 1936, c. 690, 49 Stat. 1648, which added an exemption for admissions to "concerts conducted by a civic or community membership association." As explained in the report of the Senate Finance Committee, S. Rep. No. 2156, 74th Cong., 2d Sess., pp. 31-32 (1939-1 Cum. Bull. (Part 2) 678, 699):

> Your committee has added to the House bill a provision exempting from the admissions tax *admissions paid to nonprofit community, civic, or membership concert courses or series.* The organizations furnishing these courses serve a very useful purpose to many local communities. (Emphasis supplied.)

From the outset, it is clear that the exemption was intended to cover only a limited class of organizations, i.e., those conducting concert courses or series. No further delineation of legislative purpose was made until 1951. Meanwhile, Section 801 was incorporated in the 1939 Code as Section 1701(c), dropped (with all other exemptions from the admissions tax) by Section 541(b) of the Revenue Act of 1941, c. 412, 55 Stat. 687, then

restored by Section 402 of the Revenue Act of 1951, c. 521, 65 Stat. 452, which re-enacted Section 1701(c) without change. The Report in respect to the re-enactment stated (H. Conference Rep. No. 1213, 82d Cong., 1st Sess., p. 89 (1951-2 Cum. Bull. 622, 638):

> The bill restores the provisions of section 1701 (c) of the Code without change, so that admissions to *concerts conducted by a civic or community membership association (such as orchestras, choral societies, etc.)* will be exempt from tax. (Emphasis supplied.)

Here is found the most explicit manifestation of Congressional purpose to limit the exemption to specialized membership organizations devoted primarily—if not exclusively—to conducting concerts. Assuredly, Congress did not have in mind productions merely sponsored by such organizations as fraternal orders, burial societies, or chambers of commerce.

Nothing further with any real bearing on the intent of Congress appears until 1958. Section 1701(c) was re-enacted, in the meantime, as Section 4233(a)(3) of the 1954 Code. But in 1958, the Committee Reports disclose, Congress was concerned that the Internal Revenue Service was being unnecessarily restrictive in its interpretation of the word "concerts." It was not clear whether musical comedies or reviews would be ruled exempt from the admissions tax. Accordingly, it was recommended that the scope of the statute be expanded by substituting for the word "concerts" the words "musical performances." H. Rep. No. 1159, 85th Cong., 1st Sess., pp. 1-2 (1958-1 Cum. Bull. 636); S. Rep. No. 1283, 85th Cong., 2d Sess., pp. 1-2 (1958-1

Cum. Bull. 650-651). At this juncture, it may be helpful to the Court to reproduce in full the pertinent portions of the House Report (pp. 1-2):

> Present law provides an exemption from the excise tax on admissions for "concerts" conducted by nonprofit civic or community membership associations. This bill substitutes the words "musical performances" for the word "concerts" in this exemption. As a result, an exemption from the admissions tax will be available to nonprofit civic or community membership associations not only in the case of performances by symphony orchestras, bands, and vocal groups and in the case of ballets, operas, and operettas, but also in the case of musical comedies and reviews. This change is to be effective as of the first month which begins more than 10 days after the date of enactment of this bill.
>
> * * * One of the exemptions is that provided by section 4233 (a) (3) for certain concerts. This exemption is for any admissions to concerts conducted by a civic or community membership association if no part of the net earnings inures to the benefit of stockholders or members of the association.
>
> A number of nonprofit civic or community associations have assumed that this exemption applied *to all of the musical performances they conducted,* and as a result they have sold tickets tax free on this assumption. Moreover, the Internal Revenue Service has held a substantial list of musical performances, when conducted by one of these associations, to be exempt from the admissions tax

as "concerts." These include performances by symphony orchestras, bands, and vocal groups and also such performances as ballets, classical dances, operas, and light operas. Despite this, the Internal Revenue Service recently held that the term "concerts" does not include musical comedies or reviews *put on by these associations* and that as a result, such performances *when conducted by these organizations* are subject to the admissions tax.

Your committee believes that the present definition of the Service as to what constitutes a "concert" and therefore, what results in an exemption from the admissions tax when conducted by one of these nonprofit civic or community membership associations, is arbitrary and should be changed. Your committee sees no reason, for example, to exempt "light operas" *when conducted by such an association* and not to exempt a musical comedy or review which may be *presented by the same organization at its next performance.*

Your committee's bill, therefore, substitutes the words "musical performances" for the word "concerts" in the exemption from the admissions tax presently provided for nonprofit civic or community membership associations. In the case of these organizations this will provide an exemption not only in the case of all performances previously classified as "concerts" but also in the case of musical comedies and reviews. * * * (Emphasis supplied.)

* * *

Although Congress was obviously preoccupied here with the nature of the performance rather than the na-

ture of the conducting organization, the only fair construction of the Committee Reports is that Congress assumed throughout that the organizations involved were devoted primarily or exclusively to putting on or conducting the "musical performances."

It will be marked that the change recommended by the Committees was not enacted in Section 4233(a)(3). When the bill was laid before the Senate, a floor amendment was proposed by Senator Javits of New York on March 31, 1958. 104 Cong. Record, Part 5, p. 5784. Senator Javits, adverting to the New York City Center, proposed the same privilege for dramatic performances as for musical performances. Senator Case, co-sponsor of the amendment, regarded it as a "substantial contribution to the cultural life of communities all over the Nation." *Ibid.* Accordingly, the words "musical or dramatic performances" were substituted for the words "musical performances." After the amendment was accepted, Senator Hennings of Missouri urged prompt passage of the bill, referring specifically to the plight of the St. Louis Municipal Opera and the Kansas City Starlight Theatre. *Ibid.*

Not to labor the point, it should be apparent that the kinds of organizations specifically referred to by Congress over the period 1936-1958 (groups conducting concert courses or series, orchestral and choral societies, New York City Center, St. Louis Municipal Opera, Kansas City Starlight Theatre) are devoted primarily or exclusively to the fine arts. At no point did Congress evidence any intention to exempt organizations with other primary purposes who sponsor productions by outsiders for fund-raising or other incidental purposes.

Assuredly, close questions of construction may arise in the application of Section 4233(a)(3). But the legislative history establishes a virtual polarity between the kind of associations which Congress intended to exempt and the kind of organization claiming exemption in the case at bar. The District Court, in disregarding the legislative history and the words of limitation in Section 4233(a)(3) itself, compounded its error by ignoring the rule firmly established by decisions of this and other courts that tax exemption provisions are to be narrowly construed against those who seek to qualify under them.

Conclusion.

For the reasons stated, the judgment of the District Court should be reversed.

Respectfully submitted,

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September, 1963.

Certificate.

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Dated: 12th day of September, 1963.

RICHARD G. SHERMAN,
Assistant U. S. Attorney.

APPENDIX.

Internal Revenue Code of 1954:

SEC. 501. EXEMPTION FROM TAX ON CORPORATIONS, CERTAIN TRUSTS, ETC.

(a) *Exemption From Taxation.*—An organization described in subsection (c) or (d) or section 401(a) shall be exempt from taxation under this subtitle unless such exemption is denied under section 502, 503, 504.

* * * * *

(c) *List of Exempt Organizations.*—The following organizations are referred to in subsection (a):

* * * * *

(4) Civic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare, or local associations of employees, the membership of which is limited to the employees of a designated person or persons in a particular municipality, and the net earnings of which are devoted exclusively to charitable, educational, or recreational purposes.

* * * * *

(6) Business leagues, chambers of commerce, real-estate boards, or boards of trade, not organized for profit and no part of the net earnings of which inures to the benefit of any private shareholder or individual.

* * * * *

(26 U.S.C. 1958 ed., Sec. 501.)

SEC. 4233. EXEMPTIONS.

(a) *Allowance.*—No tax shall be imposed under section 4231 in respect of:

* * * * *

(7) *Certain amateur theater performances.*—Any admission to an amateur performance presented and performed by a civic or community theater group or organization—if no part of the net earnings thereof inures to the benefit of any private stockholder or individual.

* * * * *

(26 U.S.C. 1958 ed., Sec. 4233.)

No. 18705

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

NORMAN NATHAN SELLER,

Appellant,

vs.

UNITED STATES OF AMERICA

Appellee.

OPENING BRIEF OF APPELLANT.

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TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Miscellaneous

Rules

Statutes

Textbooks

No. 18705

IN THE

United States Court of Appeals

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NORMAN NATHAN SEMLER,

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OPENING BRIEF OF APPELLANT NORMAN N. SEMLER.

Statement Disclosing Basis of Jurisdiction.

On or about November 16, 1962, a grand jury in the United States District Court for the District of Arizona returned an Indictment against Norman Nathan Semler and 12 other persons. [Tr. I, 3.][1] Though the Indictment contained ten counts, Mr. Semler was charged in only four: Counts I, V, VII and X. Count I charged all defendants with conspiracy to steal government property and to receive stolen government property in violation of *18 U. S. C. §371 and §641.*

Count I of the Indictment sets forth 36 overt acts in which Mr. Semler was named in overt acts numbers 19, 22 and 36. Count V of the Indictment charged

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[1]Tr. I, 3. Reference is to the volume and page of the Transcript of Record, which is Volume I. The Reporter's Transcript of the Evidence will be referred to as "R.Tr." followed by the page number.

Edsel Dekalb Howell and Mr. Semler with receiving, concealing, having and retaining with the intent to convert to their own use and gain, six radio-receivers, on or about the 22nd day of March, 1962, each of a value in excess of the sum of $100.00, "which said property had theretofore been stolen as they then and there well knew, all in violation of *18 U. S. C. §641.*"

Count VII of the Indictment charged Howell and Mr. Semler with receiving 20 radio-receivers on or about March 27, 1962, and Count X charged Howell and Mr. Semler with receiving 8 radio receivers-transmitters on or about May 26, 1962.

On November 16, 1962, Mr. Semler entered a plea of not guilty as to each of Counts I, V, VII and X, with leave granted to him to file such motions or pleadings addressed to the Indictment as may be advised. [Tr. I, 4.] A motion in behalf of Mr. Semler to dismiss the Indictment, supported by a memorandum brief [Tr. I, 4, 5] was filed. A motion to strike with a memorandum in support thereof [Tr. I, 6], a motion for bill of particulars with a memorandum in support thereof [Tr. I, 7], a motion for change of venue and an affidavit and memorandum in support thereof, and a motion for severance and for separate trial together with a memorandum in support thereof [Tr. I, 9] were also filed. All of these motions were denied. [Tr. I, 10.]

A motion for postponement of the trial date together with a memorandum in support thereof [Tr. I, 11] was also filed, which motion was denied. The motions in behalf of Mr. Semler for a change of venue and for defendant's motion for continuance of trial were renewed on January 14, 1963 and were denied. [Tr. I, 13.]

The trial commenced on January 14, 1963, and continued from day to day to February 9, 1963, when the jury returned a verdict of guilty as to defendant Semler on Counts I, V, VII and X. [Tr. I, 14.]

From his conviction by the jury on the Indictment charging him with conspiracy in Count I and substantive Counts V, VII and X and from the Judgment thereon, Norman N. Semler respectfully appeals.

Notice of appeal on behalf of Mr. Semler was filed on February 25, 1963 [Tr. I, 20] and an amended notice of appeal was filed on March 5, 1963. [Tr. I, 21.]

The District Court had jurisdiction of the trial as does this Court of this appeal.

Statement of the Case.

Norman N. Semler, head of Semler Industries, Inc., has been in the business of purchasing war surplus materials since he came out of the service.[2] The business is operated from an office, showroom and warehouse on Lankershim Boulevard, North Hollywood, Califnia, with five employees. [R. Tr. 2035.] The company buys and sells surplus materials from bases around the country. [R. Tr. 2039.]

Mr. Semler first met Edsel Howell in 1955 through the head of security at Davis-Monthan Air Force Base in Tucson. [R. Tr. 2040.] At that time Mr. Semler and three other surplus dealers formed a joint venture

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[2]For seven years he was Assistant Purchasing Agent of an aircraft company. He started the war surplus business in 1955. First he was connected with Associated Surplus Company and later started the present organization known as Semler Industries, Inc. He helped organize Aircraft Electronic Dealers' Association and is President of that organization at this time. He is on the Board of Directors of the National Surplus Dealers' Association. [R. Tr. 2034 and 2035.]

called Strategic Air Parts Company, because they had purchased material which was coming out of a salvage operation of planes, and was sold by the Air Force to Page Airways Company. They, in turn, re-sold the salvage out of the airplanes to Strategic Air Parts Company. [R. Tr. 2040.]

Howell was employed as a foreman for Strategic Air Parts Company, to oversee the removal of the instruments from the airplanes purchased by Page. At that time Howell was a sergeant in the Air Force attached to Davis-Monthan Air Force Base, but it was permissible for service men to accept private employment in their off hours. He worked for Strategic Air Parts Company for about two months. [R. Tr. 2044.]

Howell Goes Into Surplus Business.

In 1956, Strategic Air Parts Company had litigation with Page Airways Company and Howell was a witness. At that time, in the corrider of the court room he stated to Mr. J. J. Candee, one of the joint venturers, and to Mr. Semler, that he (Howell) was going to get into the surplus business in his spare time and would buy and sell surplus material. Semler and Candee said to Howell to be sure to call either of them if he had anything which would be of interest to them. [R. Tr. 2046.] Later Semler had correspondence with Howell. [Exs. "B" through "G".] [R. Tr. 2047.] Mr. Semler did business with Howell in 1957 and 1958, purchasing surplus aircraft material from him and paying for the materials by checks. These exhibits are important, showing a regular course of business dealings between Mr. Semler's company

and Howell beginning in 1955. [R. Tr. 2052-2081.] The exhibits include transactions and purchases from Howell and are covered by ledger sheets, purchase orders and checks in payment therefor. [See Semler's Exhibits listed in appendix.]

When surplus aircraft material is purchased from salvage it is shipped to Semler Industries, Inc., in North Hollywood, California, then it is sent to a company to be cleaned, the metal polished, the parts sprayed, relettered and stencilled, and then sent to Lockheed Aircraft Corporation in Burbank which does the electronic check-out of the instruments. It is then certified and ready to be shipped by Semler Industries, Inc. to the purchasing customer. [R. Tr. 2087 and 2088.]

Edsel Howell, the technical sergeant stationed at Davis-Monthan Air Force Base, 15th Fighter Squadron, at Tucson, Arizona, admitted that he was involved in thefts at Davis-Monthan Air Force Base in 1961 and thereafter. [R. Tr. 1251-1252.]

Sgt. Woolridge approached Howell and said he had some radio equipment he was going to turn into the salvage yard of the 15th Fighter Squadron. Woolridge wanted to know if Howell could sell it. Howell replied, "I don't know right at present. I know a couple of guys I can call in that business." [R. Tr. 1254.] Howell testified he called Mr. J. J. Candee in Burbank first but he did not talk to him because he was not in his place of business at the time. Then he called Mr. Semler at North Hollywood, California, found him in, and stated that a friend of his had some old radio sets that he wanted to get rid of and did Mr. Semler want to purchase them. He was asked what they were and stated he did not know. Mr. Semler then told

him to find out first and call him back. [R. Tr. 1255-1256.]

Later Howell contacted Sgt. Woolridge to inquire about the units. Woolridge wrote it down on a piece of paper and gave it to Howell. Howell stated that he would call the man back. Howell called Mr. Semler, described the radio units, discussed the price, and Mr. Semler stated he would take them. Howell did not tell Mr. Semler where the radios came from. Howell asked Mr. Semler to come to Tucson and get them, but he does not remember whether Mr. Semler came to Tucson or whether he shipped the radios to him. [R. Tr. 1257.] Howell stated that he shipped some "stuff" to Semler two or three times after that. Howell admitted he was paid for the shipments but does not recall the amount. [R. Tr. 1258.]

The next occasion when Howell called Mr. Semler was in June 1961, concerning the sale of 10 ARN-14's radios. Sgt. Woolridge delivered these to Howell, who called Mr. Semler. The sets were delivered to Howell in the desert about 4 or 5 blocks from Howell's home. Then Howell called Mr. Semler and made the sale to Semler Industries, Inc. [R. Tr. 1259 through 1264.]

In July 1961, Howell stated Sgt. Woolridge again approached him and said that he had more equipment to sell. These were 7 sextants. After Howell inspected the sextants with Sgt. Woolridge and Sgt. Milne, and some ARN-21's radios, Howell called Mr. Semler and offered them for sale. Mr. Semler purchased the sextants and the ARN-21's and asked Howell to ship them to Semler Industries, Inc. [R. Tr. 1265, 1266-1267, 1268, 1269.] Later Howell called Mr. Semler and told him he had more radios for sale. Mr. Semler came

to Tucson, met Howell who made the delivery of the radios to him and the material was shipped to Semler Industries, Inc. in North Hollywood, California. [R. Tr. 1271 and 1272.]

Dixie Howell Introduces a "Conspiratorial Tone."

Howell testified that he called Mr. Semler to come to Tucson if he was interested in purchasing some radios in July, 1961. [R. Tr. 1271.] Mr. Semler came to Tucson and bought the radios. [R. Tr. 1272.] Howell stated that Mr. Semler told him at this meeting that when he (Howell) called on the telephone to describe radio sets as "suitcases" and sextants as "eyeglasses" [R. Tr. 1273]. Evidently this testimony was volunteered by Howell to introduce a conspiratorial tone to the sales transactions.

Letters sent by Mr. Semler to Howell in their dealings indicate that Mr. Semler always referred to radio-receivers as receivers and not as "suitcases." [Semler Exs. A, L, N-1, N-3, O, Q-1, Q-2, R-1, R-2, S, T, U, V, W, X, Y, AC, AD, and AE.] [Index of Exhibits indicates pages of R. Tr.] These indicate that the purchases of material were made by Semler Industries Inc. with supporting purchase orders, invoices, and checks. Nowhere in these Exhibits is there any reference to "suitcases" or "eyeglasses."

In his testimony, Mr. Semler denied [R. Tr. 2095 and 2096] that the word "eye" was used in discussions between Howell and him. The direct testimony of

Mr. Semler concerning this is stated in Reporter's Transcript 2095-2098.[3]

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[3]"Q. Did you ever receive any calls from Mr. Howell on that private line? A. No, sir.

Q. Did you ever give Mr. Howell the telephone number of that private line? A. No, I did not.

Q. What about the slang expression 'eye' for periscope? Did you ever use that, or was that ever used in any discussion between you and Mr. Howell? A. No, it was not.

Q. What about the word 'suitcase'? A. Yes, it was used.

Q. All right. Can you tell us the context, how it was used and by whom? A. Yes. Sometime in our dealings I had purchased some sextants from Mr. Howell that were not cased. And at another time—in other words, they were loose—and at another time I had purchased some that were in fiberglass—looking like suitcases, and also some that were in mahogany or some kind of hardwood, wooden case.

At another time when he offered them to me, I said, 'Do they have the little plastic suitcase-type of carrying case with them?' And this would make me determine the price of what they would be worth to me.

Q. Did he ever, in discussions with you, refer to ARN-14's, 21's or ARC-33's, or ARC-34's as suitcases of any particular length?

Mr. Lindberg: If the Court please, object to the leading nature of the question, if he's referring to a conversation, to the lack of foundation.

The Court: No, the question was did he ever. He may answer. A. No.

Q. (By Mr. Hughes) By 'he,' I refer to Dixie Howell. A. I realize that. No.

Q. With respect to the shipment of items purchased from Mr. Howell, did you ever ship from Tucson to any place other than Semler Industries? A. No, sir.

Q. Did you ever ship to any—items in any name other than the name of Semler Industries? A. No, sir.

Q. That the person, the place to which the shipment was directed, have you always used the name Semler Industries? A. Yes, sir.

Q. Did you always use your business address? A. Yes.

Q. So far as the documents that were prepared at the time of shipping, did you—what name did you use? A. You mean when I signed it or when I addressed it?

Q. Both, so far as the sender was concerned? A. Well, the sender was Semler Industries and then the little place where you sign it, I—If I were the shipper I would sign it there.

Q. Did you always sign your own name? A. Yes.

Q. Did you ever sign any name other than your own? A. No.

Howell testified that he received from $16,000 to $20,000 from Semler Industries, Inc. for the sale of salvage materials. [R. Tr. 1304.] Howell retained one-third for himself and gave Woolridge two-thirds of the money for distribution to the persons involved in the thefts of the salvage materials sold to Semler Industries, Inc. by Howell. [R. Tr. 1269.]

The Charges Against Appellant.

Count I charges Mr. Semler with conspiracy to receive Government property together with 20 other persons, most of them connected with the Davis-Monthan Air Force Base at Tucson, Arizona and at Phoenix, Arizona. Some were named as co-conspirators but not as defendants. (Indictment pages 1 through 8.) Included in Count I are 36 alleged overt acts setting forth the activities of the alleged co-conspirators. Mr. Semler is named in 3 alleged overt acts.[4] Mr. Semler

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Q. What about Mr. Howell, did he use any different names when he was contacting you? A. Other than Howell?

Q. Yes. A. No, other than his first name, or oh, sometimes after I got the call through he's say, 'Hello, Sem, this is Dixiebelle.'

Q. Did he ever use the name, 'Jackson'? A. No, sir.

Q. And all the calls that you received from Mr. Howell came through the number that is answered by your secretarial staff? A. By the girls, yes."

[4]19. That on or about the 22nd day of March, 1962, defendant Norman Nathan Semler drove to the Sands Motor Hotel parking area, Tucson, Arizona, and parked the car he was driving next to the said truck of defendant Edsel Dekalb Howell.

22. That on or about the 29th day of March, 1962, Clint Roger Woolridge and defendant Edsel Dekalb Howell drove to the Tucson Municipal Airport at Tucson, Arizona, in the truck of defendant Edsel Dekalb Howell and met defendant Norman Nathan Semler.

36. That on or about the 25th day of June, 1962, defendant Norman Nathan Semler felw to Tucson, Arizona and rented a car.

was indicted on Counts V, VII and X (all substantive counts), for theft of Government property and knowingly receiving stolen Government property.[5]

It will be noted that Counts V, VII and X charge Howell and Mr. Semler with receiving, concealing, retaining with intent to convert to their own use and gain a total of 34 radio receiver-transmitters, "all of which said property had theretofore been stolen as they then and there well knew, all in violation of 18 U. S. C. §641." Howell pleaded guilty to these and other Counts and received a one year's sentence after he testified in behalf of the Government. His testimony does not indicate (1) that Mr. Semler knew that the merchandise was stolen, and (2) that Mr. Semler received and retained the merchandise for his own use knowing it was stolen, or converted for his own use and gain. Howell's testimony clearly indicates that he sold the merchandise to Semler Industries, Inc. and was paid for it. [R. Tr. 1267, 1272, 1282, 1286, 1287, 1288, 1301, 1303 and 1304.]

Trial Judge Halts Cross-Examination of Howell.

In the cross-examination of witness Howell, the Court did not permit questions to be asked concerning sales of stolen Air Force property by Howell to persons other than appellant Semler. [R. Tr. 1386.] On direct examination [R. Tr. 1300, lines 2-8], the Government was permitted to question witness Howell about this, but on cross-examination the Court did not permit the cross-examination to develop sales of stolen Air Force property by Howell to other persons.

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[5]See Indictment [Tr. I, pp. 9, 10, 11].

Defense Counsel representing defendant Semler, asked witness Howell [R. Tr. 1386, line 21] if Howell sold stolen United States Government property to any one other than Mr. Semler. The Court, on page 1387, line 17, cautioned the witness that he has the right to refuse to answer on the grounds that the answer might incriminate him.[6]

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[6]The cross-examination concerning this point begins on page 1386, line 3 (following the Q. by Mr. Chandler):

"Q. Did you generally sell, during this period of time, to other people other than Mr. Semler?

Miss Diamos: Objection, your Honor. Immaterial.

The Court: No. He may answer that question. We won't go into the details of it. He may answer this question.

The Witness: Do I have to answer that question, sir?

The Court: Yes, sir. Just yes or no.

A. Would you repeat the question, sir?

Q. (By Mr. Chandler): During the period of time that we are now discussing, I'm talking about 19—well, late '60, '61—no, I'm talking about '61; May of '61 until May of '62, did you generally sell property to people other than Semler? A. Could I refuse to answer that, sir?

The Court: Pardon me. Property generally, Mr. Chandler?

Mr. Chandler: No, not property generally.

Q. (By Mr. Chandler): I want to limit the question, Mr. Howell, to property that you either took from the United States or that you know—that you knew was taken from the United States, radio, electronic or other equipment relating to aircraft. Did you, during that period of time, make sales to other persons, other than Mr. Semler?

Mr. Muecke: It's immaterial, your Honor. Furthermore, it calls for a conclusion on his part. We were not permitted to have witnesses testify as to whether the property was or was not the property of the United States.

He is asking the same question. Asking the witness to tell whether or not he knew it was property of the United States and we are going beyond the scope of the direct again, and it's immaterial.

The Court: No. The objection will be overruled.

Mr. Chandler: Do you remember the question, Mr. Howell?

The Court: Just a moment, Mr. Chandler.

Read me the question, Mr. Reporter.

Trial Judge Gives Conspiracy Instruction at Beginning of Trial.

At the beginning of the trial when the second witness (Chappell) was called to the stand and his direct examination progressed for a while, the Court gave a conspiracy instruction to the jury endeavoring to distinguish between evidence that will be offered under the conspiracy count (Count I) and evidence that may be

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'Whereupon, the pending question was read by the Reporter'

The Court: In the light of that question, Mr. Chandler, it's my duty to instruct the witness as to his rights with regard to that particular question.

Sergeant Howell, you have a right when a question similar to this is asked you, transactions other than you have heretofore pleaded guilty on, you have a right to assert your constitutional rights to refuse to answer the question on the grounds that it may incriminate you, and that right is not only to refuse to answer the question on the grounds that it may incriminate you, but any question that might lead, if you answered it, to a line of inquiry and other questions and other answers that might incriminate you.

If you desire to exercise that right, you must exercise it at the outset of the questioning. In other words, whenever the subject is taken up as to which you feel ultimately answers may incriminate you.

Those are your rights and you are entitled to rely on them. As a matter of fact, looking up, I just see Mr. Tinney in the courtroom, and you are entitled to the advice and counsel of Mr. Tinney at this time.

Would you come up, Mr. Tinney.

Mr. Tinney: Yes, sir.

The Court: You can either consult with your client here or you may do it—you may withdraw for consultation if you desire.

Mr. Tinney: I would prefer to have an instance of counseling with my client out of the courtroom, your Honor.

The Court: Very well. Are you prepared to go to another subject, Mr. Chandler, and let the witness have the advice of his counsel before pursuting this?

Mr. Chandler: Yes, I will try to stay away from anything that might raise the problem, and if he'd stand behind me and just tug me if I do.

The Court: Very well."

offered as to the substantive counts (Counts II and IV through X.)[7] This unusual instruction to the

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[7]R. Tr. 133, line 16, through 137, line 22:

"The Court: Members of the Jury, at this time I am going to give you an instruction or instruct you as to your consideration of an application of evidence that may be introduced in the case, and there will be a difference between the evidence that is offered under the conspiracy count or count 1 and evidence that may be offered as to the substantive counts, that is count 2—there is no count 3—and counts 4 through 10.

I will begin by telling you that when several defendants are on trial ordinarily there is admissible against each defendant evidence of only his own acts and evidence of an act done by a co-defendant or another person may not be considered by the jury as against the defendant not doing the act. In such a case ordinarily, also, a statement is made outside court by one defendant or by another person, may not be considered as evidence against a defendant not present when the statement was made. This, as I say, is the rule ordinarily applicable to evidence introduced in this case with respect to count 2 or count 4 through 10, the substantive counts. With respect to any of those counts, evidence of an act done or a statement made outside of court by one defendant or another person may not be considered by you as evidence against another defendant not present when the act was done or the statement was made. When, however, two or more persons associate themselves together in a conspiracy, that is, a combination or agreement to violate the law, there arises from the very act of associating themselves together for such a purpose a kind of partnership in which each party to the combination or agreement is the agent of every other party to the plan. Consequently, in a case where the evidence shows beyond a reasonable doubt a conspiracy or a common plan or arrangement to violate the law, entered into between two or more persons, evidence as to an act done or a statement made by one is admissible as against all, provided the act be done knowingly and the statement be made knowingly during the continuance of the conspiracy and in furtherance of an object or a purpose of the conspiracy. With regard only to count 1 of the indictment in this case, the count which charges all of the defendants with conspiracy, I instruct you that if you find from the evidence beyond a reasonable doubt that the defendants or some of them entered into a conspiracy as charged in count 1, to steal, take and carry away, and to receive and conceal, have and retain, with intent to convert to their own use and gain, certain property of the United States Air Force, the evidence as to any act done or

jury at the beginning of the trial is contrary to Rule 30, F. R. Cr. P., which provides:

"* * * the court shall instruct the jury *after* the arguments are completed." (Emphasis added.)

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statement made by one of the defendants who was a party to the conspiracy is admissible against all who were parties to the conspiracy, provided the act was knowingly done or the statement was knowingly made, during the continuance of the conspiracy. In order to establish proof that a conspiracy existed, as charged in count 1, the evidence must show beyond a reasonable doubt that the parties to the combination or plan or agreement in some way or manner, or through some contrivance positively or tacitly came to a mutual understanding to try and accomplish their common object or purpose. In order to establish proof that a particular defendant was a party to or a member of a conspiracy, the evidence must show beyond a reasonable doubt that the conspiracy was formed and that the defendant knowingly participated in the conspiracy with the intent to advance or further some object or purpose of the conspiracy. In determining whether or not a particular defendant was a party to or a member to a conspiracy, the jury is not to consider what others may have said or done. That is to say, the membership of a defendant in a plan or arrangement or agreement must be established by evidence of his own conduct, what he himself said or did. Thus, with regard to count 1, if and when, but only if and when, it appears from the evidence beyond a reasonable doubt that a conspiracy did exist and that a defendant was one of the parties thereto, then the acts thereafter knowingly made by a defendant likewise found to be a party to the conspiracy, may be considered by the jury as evidence in the case as to the defendant found to have been a party, even though the acts or statements may have occurred in the absence of and without the knowledge of such defendant, provided such acts or statements were knowingly done or made during the continuance of the conspiracy and in order to further an object or a purpose of the conspiracy.

With regard to counts 2 and 4 through 10, evidence admitted of any act done by one person will not be considered by you as evidence against any other person, unless the latter was present and heard the statement made.

That is the rule of evidence that is applicable in the matter. Of course the issue of whether or not there was a conspiracy cannot be settled with one sentence, one witness or anything else, but you will have to bear in mind what must be established, as I have explained it to you,

No Knowledge That Material Was Stolen.

There is no question that a number of air force employees conspired with Sgt. Clinton R. Woolridge over a period of years to break into storage sheds and airplanes to steal salvage material at Davis-Monthan Air Force Base in Tucson, Arizona. [R. Tr. 1447.] There is also no dispute that Woolridge then sought out Sgt. Howell to sell the stolen goods. [R. Tr. 1447.] Woolridge, in his direct examination by the U. S. Attorney [beginning R. Tr. 1443], stated that he had been in the Air Force for 12 to 13 years and that he knew Sgt. Howell. He admitted that he talked to Howell during 1961 about the sale of some radios and he procured other air force personnel in the Supply Department to help him steal the salvage items in the salvage yard. [R. Tr. 1447.] He also admitted that he "sold the stuff that we obtained to Dixie Howell" [R. Tr. 1450.] He also described how he, Dixie Howell and John Milne did the stealing in the fall of 1961, when they crawled under the fence and removed 6 items from aircraft. [R. Tr. 1252.]

Mr. Semler did not know about the thefts by Woolridge and his group of airmen [R. Tr. 221][8] and the

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before you will be permitted to consider the act or statement, or statement of one defendant or another person outside of the presence of that other person. You will have to apply it in accordance with the rules I have just given."

[8]Under cross-examination by Mr. Muecke [R. Tr. 2219 through 2223] Mr. Semler described how he purchased salvage airplane material from Howell.

Reporter's Transcript, page 2219, line 23:

"Q. During the period then that Dixie was a foreman for Strategic this was the operation that went on, Page would buy the plane, remove it from the storage area to the smelter area and then they would notify you about a particular plane—by you, I mean Strategic Air Parts,

agreement to sell the receivers to Dixie Howell. [R. Tr. 1450.] Mr. Semler was called in by Howell to buy the equipment, but Howell did not disclose to Mr. Semler that the equipment was stolen. The testimony

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and in turn you would send Dixie and his crew to taking the equipment off, is that correct? A. That is correct, yes, sir.

Q. During that period Dixie sold no equipment to Strategic that you know of? A. No, it would have been our equipment.

Q. He was on a straight salary with you? A. Yes.

Q. Following the period when Dixie was not working for Strategic and you said that he went into the junk business, or he said that he went into the junk business on his own, do you recall what his operation was at that time? A. No, I do not.

Q. Why do you say that? A. I don't recall.

Mr. Hughes: I object to that. That is argumentative, the manner in which the question was put.

Q. (By Mr. Muecke) I will make it more specific, Your Honor.

How did you enter into the arrangement with Mr. Howell to get equipment for you—I presume that is what we are talking about, is that correct? After he quit working for Strategic, he began to deliver equipment to you personally? A. He sold me equipment, yes, sir.

Q. And he did? A. Yes, sir.

Q. Do you know where he got the equipment from? A. No, I do not.

Q. In other words, you didn't inquire into that? A. No, I did not.

Q. Because it is a practice of your business not to inquire into sources? A. Yes, sir.

Q. So that you would simply tell him what you wanted? A. No, the other way. He would offer me various items and I would buy it if I thought it was a good buy, something I could use.

Q. And do you recall any conversation where he told you where those items came from? A. I do not.

Q. You don't recall? A. I do not recall.

Q. There is something, was something in your testimony about competitors that were on the area here who were also salvaging. Can you tell us the names of some of those competitors during this period? A. The principal competitor in this area that I had reference to was J. J. Candee.

Q. And you stated, I believe, he got—was it sextants, $50 for 50, is that correct? A. No.

of Woolridge indicates that he sold the equipment to Howell who in turn sold it to Semler Industries, Inc. [R. Tr. 1445-1446.]

Prejudicial Newspaper Publicity.

From the Indictment in July, 1962, and continuing through the end of the trial in February, 1963, the thefts from Davis-Monthan Air Base in Tucson, Ari-

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Q. What was it you said he got cheaper? A. He bought—I bought from him, rather, amplifiers and gyros at $50, which I had been previously, the best price I could buy them was at $75.

Q. This was in 1957? A. No, sir.

Q. When was this? A. This would have been, I believe, in 1961 or '62.

Q. Well, going back to 1957, were there other competitors during that time, people getting salvage in the Tucson area from the Military? A. There were a lot of people getting, yes. Aero Sales was here, Thompson Aircraft was, I believe, taking delivery of planes at that time. I am not sure. There were many people doing this.

Q. During this time then did you get your salvage or surplus from Dixie Howell in 1957? A. I did buy some, yes, sir.

Q. You say that you never indicated to him what you wanted, but he would tell you what he had, is that correct? A. No. Generally he would offer me certain items, but as has been a practice of mine, if I believe an item is available in a certain area or certain place, or knowing they are wrecking planes, or knowing they are dismantling boats, whatever the item may be, I would contact somebody in that area and ask them: 'I am looking for such and such.'

Q. How do you find out certain parts are available in a certain area? A. Well, this is one of the things you learn after being in the business 16 or 17 years. I generally know that aircraft by the hundreds, if not thousands, have been wrecked and dismantled in Arizona.

I likewise know that certain other types of equipment would be available in the Texas area.

Q. I don't mean to interrupt you, but let's say in the Arizona area, how would you know that certain types of equipment are available in Tucson, let's say? A. I am on the National Bidders list, my company is, and I generally receive most of the bids.

Q. Do you get a catalog which covers what is offered for sale? A. I get a good portion of them, yes."

zona were played up in the newspapers. Mr. Semler was unfavorably described as "Mr. Big," "The leader of the conspiracy," "Top Suspect Nabbed in Calif.," "Has To Be A Little Crooked," "Convicted Sergeant Testifies," "Coast Man Linked To D-M Thefts," "Involved In 'Dry Run'—3 D-M Theft Case On Probation," "Semler Owes Me $17,000, says Former D-M Airman," "Semler Haggled On Price, Says Former D-M Airman," "Wealthy Californian's Name Enters Case—United States Witness Says Semler Had Radios," "Semler, D-M Cohorts Found Guilty," and "Semler Sentenced To 2½ Years—Air Force Thefts."

This constituted a serious impairment to Mr. Semler and prevented him from obtaining a fair trial by an impartial jury as guaranteed to him by the sixth amendment of the Constitution. This will be covered in the argument under the heading "Prejudicial Newspaper Publicity." A number of the articles appearing in the newspapers are set forth in the Appendix under the title "Newspaper Articles."

Mass Trial of Defendants.

Mr. Semler was obliged to stand trial with 7 other defendants out of 21 who were indicted. It was not made clear to the jury that of the remaining 14 who were indicted and not put on trial, that their cases were disposed of on pleas and the Indictments were dismissed as to others. Among the 13 not tried was Sgt. Woolridge who organized the thefts. Sgt. Dixie Howell was tried with Mr. Semler, but he was a Government witness and received an extremely light sentence of one year in jail for buying all the stolen material. This deprived Mr. Semler of a fair trial and will be discussed further in the Argument.

The Jury Read the Newspapers.

The jury panel consisted of 28 jurors. [R. Tr. 3.] Between the defendants and the Government 14 challenges were used, which left a panel of 12 jurors and 2 alternates. The Judge consumed 8 pages describing to the members of the panel the "general idea of the nature of the case. . . ." [R. Tr. 4-12.]

On a show of hands 26 out of 28 jurors indicated that they subscribed to the *Arizona Daily Star* or to the *Citizen,* newspapers printed in Tucson. All of them raised their hands indicating that they read the Sunday edition of the *Arizona Daily Star*. [R. Tr. 34.] Juror Abbott stated she had a son-in-law on the police force in the City of Tucson. [R. Tr. 36.] Juror Pellon stated he had a brother-in-law on the Tucson police force. [R. Tr. 38.] Juror Michall stated her son is in the air force, in the military police and security [R. Tr. 39], and Juror Watwood stated that he read newspaper accounts about the case two or three days before the case went to trial.

It is interesting to note the dialogue between the trial judge and juror Watwood [R. Tr. 20, 21]:

> "The Court: Any other jurors who read anything about the—Mr. Watwood?
>
> Mr. Watwood: I read the newspaper account rather sketchily, that's all.
>
> The Court: When was this, Mr. Watwood?
>
> Mr. Watwood: Recently. I don't remember, Friday or Saturday.
>
> The Court: Some days back? Well, can you now recall, Mr. Watwood—and I don't want the details, but can you just answer this yes or no—

can you now recall the details of the article that you read?

Mr. Watwood: No, only in a general way.

The Court: I see, well, whatever it was that you read, did it cause you to form or to express any opinion as to the guilt or innocence of any of the defendants in the case?

Mr. Watwood: No.

The Court: If you were chosen and selected to try the case as a juror, would you be able and would you keep completely out of your mind whatever it was you may have read and base your verdict in the case solely on the evidence in the case and the Court's instructions as to the law?

Mr. Watwood: That's right.

The Court: And you would do that?

Mr. Watwood: Yes.

The Court: Thank you, sir."

From the foregoing it is apparent that juror Watwood was anxious to get on the jury to try this case and either consciously or subconsciously had a reason to serve, which may be construed as prejudicial to appellant Semler in view of the wide newspaper publicity given this case.

Specifications of Errors Relied Upon.

1. The evidence is insufficient to sustain a conviction as to Count I of the Indictment stated upon an alleged conspiracy in which it is claimed Mr. Semler participated.

2. The evidence is insufficient to sustain a conviction as to Counts V, VII and X of the Indictment.

3. The Court erred in excluding cross-examination of witness Howell, who was an accomplice, concerning sales of property stolen from Davis-Monthan Air Force Base to persons other than the defendant, Mr. Semler.

4. The Court erred in failing to provide Appellant a fair trial and an impartial jury.

5. The Court erred in failing to grant Appellant Semler's motions to dismiss the Indictment, the motion to strike, the motion for change of venue, the motion for severance and for separate trial, the motion for a new trial and for denying Appellant's motion for judgment of acquittal.

ARGUMENT.

I.

The Evidence Is Insufficient to Sustain a Conviction on the Conspiracy Count.

Lack of complicity in the criminal conspiracy by Appellant Semler requires reversal of judgment. The testimony clearly shows that Sgt. Woolridge and Sgt. Dixie Howell set up the thefts of the salvage radios from the airplanes and that Mr. Semler was not aware that this was stolen merchandise. [R. Tr. 2221.] Woolridge completed the thefts with his gang and sold the material to Dixie Howell. [R. Tr. 1450.] He in turn sold the material to Semler Industries Inc. of North Hollywood, California. [R. Tr. 1257, 1258-1259 through 1264.] Therefore, there was no complicity on the part of Appellant Semler in the criminal conspiracy of these men.

In *Scales v. United States,* 367 U. S. 203 at 225 (1961), footnote 17, the Court defined "complicity" as follows:

> "A person is an accomplice of another person in commission of a crime if:
>
> "(a) with the purpose of promoting or facilitating the commission of a crime, he
>
> "(1) commanded, requested, encouraged or provoked such other person to commit it; or
>
> "(2) aided, agreed to aid or attempted to aid such other person in planning or committing it. . . .
>
> "(b) acting with knowledge that such other person was committing or had the purpose of committing the crime, he knowingly, substantially facilitated its commission. . . ."

The case goes on to state at page 227:

> "What must be met, then, is the argument that membership, even when accompanied by the elements of knowledge and specific intent, affords an insufficient quantum of participation in the organization's alleged criminal activity, that is, an insufficiently significant form of aid and encouragement to permit the imposition of criminal sanctions on that basis."

Appellant Semler was called on the telephone by Howell to buy the material after it was stolen. Therefore, it cannot be claimed that he participated in the act of agreement to steal the material. [R. Tr. 1257, 1258.]

It will perhaps be claimed by the Government that because Mr. Semler's company purchased the material from Howell, that this made it possible to carry out the unlawful object of the conspiracy, but in *Direct Sales Co. v. United States,* 319 U. S. 703, 709 (1943) the Supreme Court said that:

> "One does not become a party to a conspiracy by aiding and abetting it, through sales of supplies or otherwise, *unless he knows of the conspiracy* . . ." (Emphasis added.)

It has also been stated that to aid and abet a crime it is not necessary merely to help the criminal, but to help him in the commission of the particular criminal offense. A person does not aid and abet a conspiracy by helping the conspiracy to commit a substantive of-

fense, for the crime of conspiracy is separate from the offense which is its object.

Pereira v. United States, 347 U. S. 1, 11 (1954);
People v. Tavormina, 257 N. Y. 84, 177 N. E. 317 (1931).

There was no criminal intent in this case on the part of Appellant Semler. In every sense of the term he was an innocent purchaser for value.

II.

The Evidence Is Insufficient to Sustain a Conviction as to Counts V, VII and X of the Indictment.

The prosecution failed to establish that Appellant Semler was guilty under Counts V, VII and X because it did not prove that when he purchased the material from Howell that he did so "knowing it to have been embezzled, stolen, purloined or converted" as provided in 18 U. S. C. A. §641.

The conspiracy statute (18 U. S. C. A. §371, 1952) contains no provision for liability for substantive crimes, and 18 U. S. C. A. §641 provides for knowledge on the part of one who acquires property of the United States that the property was embezzled, stolen or purloined.

In *United States v. Peoni,* 100 F. 2d 401 (2d Cir. 1938) (L. Hand, *J.*) the Court held that a defendant, in addition to having knowledge of the probable result, must have "a stake in the outcome" of a crime in order to be convicted as an accomplice. In *Peoni,* the defendant having sold counterfeit bills to X, who in turn sold some to Y, was convicted as an accomplice to Y's crime of passing counterfeit money. This conviction

was reversed on the ground that there was no proof the defendant had an interest in furthering Y's activities.

III.

The Court Erred in Excluding Cross-Examination of Witness Howell Concerning Sales of Stolen Government Property to Other Persons.

The trial court did not permit counsel for Appellant Semler to proceed with the cross-examination of witness Howell concerning sales of the stolen material to persons other than Appellant Semler. This was highly prejudicial to Appellant Semler. A full review of the trial court's action is set forth in footnote 5 to the Statement of The Case appearing on page 10 of this brief.

In *Rogers v. United States,* 340 U. S. 367 (1951), the court sustained a conviction of contempt. In testifying before the Grand Jury defendant admitted that she had been Treasurer of the Communist Party for Denver. However, she refused to tell to whom she had turned over certain records. In sustaining the conviction, the Supreme Court noted at page 371:

> "To uphold a claim of privilege in this case would open the way to distortion of facts by permitting a witness to select any stopping place in the testimony."
>
> * * * * *
>
> "But petitioner's conviction stands on an entirely different footing, for she had freely described her membership, activities and office in the Party. Since the privilege against self-incrimination presupposes a real danger of legal detriment arising

from the disclosure, petitioner cannot invoke the privilege where response to the specific question in issue here would not further incriminate her. Disclosure of a fact waives the privilege as to details. As this Court stated in *Brown v. Walker,* 161 U. S. 591, 597 (1896):

> 'Thus, if the witness himself elects to waive his privilege, as he may doubtless do, since the privilege is for his protection and not for that of other parties, and discloses his criminal connections, he is not permitted to stop, but must go on and make a full disclosure.'

"Following this rule, federal courts have uniformly held that, where criminating facts have been voluntarily revealed, the privilege cannot be invoked to avoid disclosure of the details. The decisions of this Court in *Arndstein v. McCarthy,* 254 U. S. 71 (1920), and *McCarthy v. Arndstein,* 262 U. S. 355 (1923), further support the conviction in this case for, in sustaining the privilege on each appeal, the Court stressed the absence of any previous 'admission of guilt or *incriminating facts,*' and relied particularly upon *Brown v. Walker, supra,* and *Foster v. People,* 18 Mich. 266 (1869). The holding of the Michigan court is entirely apposite here:

> 'Where a witness has voluntarily answered as to materially criminating facts, it is held with uniformity that he cannot then stop short and refuse further explanation, but must disclose fully what he has attempted to relate'. 18 Mich. at 276."

In *Brown v. United States,* 356 U. S. 148 (1958) the court sustained a conviction for contempt due to petitioner's failure to answer questions on cross-examination in a denaturalization suit. The Court therein noting at pages 154 and 155:

> "Our problem is illuminated by the situation of a defendant in a criminal case. If he takes the stand and testifies in his own defense, his credibility may be impeached and his testimony assailed like that of any other witness, and the breadth of his waiver is determined by the scope of relevant cross-examination. 'He has no right to set forth to the jury all the facts which tend in his favor without laying himself open to a cross-examination upon those facts.' *Fitzpatrick v. United States,* 178 U.S. 304, 315; and see *Reagan v. United States,* 157 U.S. 301, 304-305. The reasoning of these cases applies to a witness in any proceeding who voluntarily takes the stand and offers testimony in his own behalf. It is reasoning that controls the result in the case before us."

The basic reasoning which compels conclusion that the witness Howell should not have been able to claim the privilege against self incrimination with respect to sales to persons other than appellant Semler when being subject to cross-examination was stated by Judge Learned Hand in *United States v. St. Pierre,* 132 F. 2d 837 (2d Cir. 1942) cert. dismissed 319 U. S. 41 where he noted at page 839:

> "The law in this country has developed without such irrational refinements; it rests upon the obvious injustice of allowing a witness, who need

not have spoken at all, to decide how far he will disclose what he has chosen to tell in part, and how far he will refuse to let his veracity be tested by cross questioning. In adversary cases it is hard to see how a trial could go on, if this were allowed. Certainly the party who has called the witness should not profit by what he says, and it is small relief for the judge to admonish the jury to disregard what they have heard. The witness has no just claim for such tenderness, unless he has not learned of his privilege before he consents to speak, and not then if the law charges him with knowledge of it anyway. It must be conceded that the privilege is to suppress the truth, but that does not mean that it is a privilege to garble it; although its exercise deprives the parties of evidence, it should not furnish one side with what may be false evidence and deprive the other of any means of detecting the imposition. The time for a witness to protect himself is when the decision is first presented to him; he needs nothing more, and anything more puts a mischievous instrument at his disposal."

IV.

The Court Erred in Failing to Provide Appellant Semler With a Fair Trial and an Impartial Jury.

A. Prejudicial Joinder of Appellant Semler With Other Defendants.

Rule 14 of the Federal Criminal Rules is entitled "Relief From Prejudicial Joinder." The rule provides that if a party is prejudiced by a joinder of offenses

or defendants, the Judge may or may not do something about it. The literal language of the rule permits a judge to find as a fact that a defendant is prejudiced by a joint indictment but still allows a mass trial on the theory that instructions will magically cure the prejudice.

Judge Learned Hand commented on this rule with tongue-in-cheek and illustrated how rough this brand of justice is on defendants in *Nash v. U. S.,* 54 F. 2d 1006 (2d Cir. 1932) when he declared at page 1007:

> "In effect, however, the rule probably furthers, rather than impedes the search for truth, and this perhaps excuses the device which satisfies form while it violates substance; that is, the recommendation to the jury of a mental gymnastic which is beyond, not only their powers, but anybody else's."

Whenever a crime involves more than one actor, the courts must balance the need for trial procedures capable of dealing efficiently with joint defendants against the need for protecting the rights of the individual defendant. (*Krulewitch v. U. S.,* 336 U. S. 440, 445 (1949).)

When the prosecution presents a mass of evidence as to a complex conspiracy involving a large number of defendants, it is likely that the jury will infer an association among the defendants merely from the fact that they are being tried together. (*United States v. Standard Oil Co.,* 23 F. Supp. 937 (WD Wis. 1938).)

B. Prejudicial Newspaper Publicity.

The constitutional rights of an accused are first jeopardized when the crime is reported in the newspapers. Communal hostility is naturally directed at the accused, especially after he is indicted. When he is unfavorably described as "Mr. Big", "the leader of the conspiracy," and statements are issued by the U. S. Attorney and the F. B. I. before the trial, an atmosphere is created against the accused which makes a fair trial by an impartial jury impossible as guaranteed by the Sixth Amendment of the Constitution. He is tried and convicted before the trial starts.

Our judicial system seeks "the ascertainment of the truth according to the rules of evidence."[9] Certain evidence is excluded because of its tendency to "confuse, mislead or prejudice juries."[10] Mere suspicion, choice of possibility or probability, surmise, speculation, conjecture and insinuations are not regarded as evidence in a judicial proceeding. A U. S. Attorney is not permitted to introduce any evidence which does not conform to the rules of evidence. However, when the press releases a vast amount of publicity daily, the jurors are faced with information unchecked by the selective processes of the law. The people who supply the printed information are "unsworn, unconfronted, uncross-examined and uncontradicted."[11]

In *State v. Taborsky,* 20 Conn. Supp. 242, 131 A. 2d 337 (1957), aff'd. 147 Conn. 194, 158 A. 2d 239 (1960), a highly publicized murder case, the defendant's motion for a change of venue was denied.

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[9]Conrad, *"Modern Trial Evidence,"* Preface V (1956).
[10]Conrad, *"Modern Trial Evidence,"* at page 26.
[11]Conrad, *"Modern Trial Evidence,"* at page 19.

The court, admitting that there had been "unusual publicity" connected with the case stated that there was no evidence before the court indicating prejudicial results from such publicity.

The Judge refused to apply the Supreme Court case of *Shepard v. Florida,* 341 U. S. 50 (1951) stating, "no such (Southern) prejudice could possibly exist in Hartford County." The Court further stated in that case:

> "Undoubtedly such publicity had an impact on general public opinion and probably created indelible marks * * * But despite the efficient publicity, it is doubtful that there are many people in the county who would be unwilling to accord the defendant a fair trial."

The Court treated the problem as if the community could be impartial at its will despite effects of the "indelible unconscious marks" which were created by the press. A deluge of prejudicial information was printed in the *Taborsky* case that would never be admitted as evidence in a court room.

As a result of the mass publicity given to our case in Tucson, Arizona,[12] it would have been extremely difficult to locate anyone who had not read about it in the newspapers. In the article in the "Arizona Daily Star" dated July 3, 1962, Edward Boyle, an F. B. I. Agent, in charge of Arizona, gave an interview stating that the investigation is continuing and other arrests may occur; that F. B. I. Agents are searching for other hidden radio sets and are investigating how the sets were disposed of; that the radios

[12]See Newspaper Articles in appendix.

were a "hot item" and much in demand for both military and civilian aircraft; that the sets were probably disposed of through both local and interstate outlets; that he would not comment on the question of whether they were smuggled out of the country for use by planes of a foreign country.

The article further states that investigators "hinted" that the thefts may have occurred over a two to three year period and that the overall value of the missing equipment may reach an estimated $300,000 to $400,000. In the story there is this quote:

> "They've been stealing them blind out there (storage yard) for years."

and attributed this to "a source."

On November 8, 1962, "The Arizona Daily Star", circulated in Tucson, Arizona, ran a 5-column heading in its new section blazening these headlines:

> "TOP SUSPECT NABBED IN CALIF. GRAND JURY INDICTS 13—D-M THEFT PROBE"

The story went on to state:

> "In North Hollywood, Calif., FBI Agents arrested Norman Nathan Semler, described as the 'Mr. Big' of the theft ring."

Nothing in the story would indicate that Mr. Semler was attempting to flee or to avoid arrest to justify the headline, "Top Suspect Nabbed in Calif." The article continues with statements attributing to Mr. Muecke, United States Attorney, the following:

> "After processing the equipment in the plant the stolen items were sold to other parties, Muecke said. Semler did business with Spain, Formosa

> and West Germany *but Muecke said he had no knowledge that he ever sold any of the equipment —some of it the latest classified type—to any iron curtain country. 'But that's not saying some of it didn't eventually end up in Red hands,' Muecke said.*" (Emphasis added.)

As a result of this damaging newspaper publicity, a motion was filed in behalf of appellant Semler for a change of venue which was denied. While the courts have held that extensive newspaper comment does not establish inability to receive a fair trial,[13] nevertheless in our case there is a strong inference that bias existed in the minds of the jurors as a result of the intensive campaign by the press, in publishing prejudicial material and the motion for change of venue should have been granted.[14]

The Supreme Court in *Crawford v. United States,* 212 U. S. 183 at 196 (1909), has declared that:

> "Bias or prejudice is such an elusive condition of the mind that it is most difficult, if not impossible, to always recognize its existence, and it might exist in the mind of one * * * who was quite positive that he had no bias, and said he was perfectly able to decide the question wholly uninfluenced by anything but the evidence."

In *United States v. Accardo,* 298 F. 2d 133 (7th Cir. 1962) the Court stated that each case based upon the issue of adverse publicity must rest on its special facts. The Court, in reversing the conviction, asserted that the published material would have been inadmis-

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[13]*State v. Taborsky,* 20 Conn. Supp. 242, 131 A. 2d 337 at p. 339.

[14]*People v. Sandgren,* 75 N. Y. S. 2d 753 (1947).

sible in evidence because of its tendency to prejudice the defendant. Thus, any published material which is prejudicial and which is likely to reach the jury through news accounts should be proper grounds for reversing a conviction.

A persistent practice of "insuring" a defendant of a fair trial has been to instruct the jury that they should disregard the prejudicial newspaper accounts.[15] This is not fair since it does not insulate the trial jury from hostile sentiment. Judge Frank of the Court of Appeals, Second Circuit, remarked that such an instruction "is like the Mark Twain story of the little boy who was told to stand in a corner and not to think of a white elephant."[16]

A Pennsylvania District Court, in *United States v. Ogden,* 105 Fed. 371 (1900), declared at page 373:

> "It is greatly to be deplored that a practice of which we see too many examples should exist, and that persons accused of crime should be put on trial in the columns of the newspapers, and should be declared to be guilty and denounced as criminals before there has been a careful and impartial trial in the proper and lawful tribunal."

The Court of Appeals, Sixth Circuit, in *Briggs v. United States,* 221 F. 2d 636 at p. 638 (6th Cir. 1955), stated that one of the

> "fundamental rules of criminal law is that a defendant in a criminal case is entitled to be tried by jurors who should determine the facts submitted

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[15]*Marshall v. United States,* 360 U. S. 310 (1959).

[16]*Leviton v. United States,* 193 F. 2d 848, at 865 (2d Cir. 1951), cert. den. 343 U. S. 946 (1952).

to them wholly on the evidence offered in open court, unbiased and uninfluenced by anything they may have seen or heard outside of the actual trial of the case."

There is little doubt that the power exists in a Federal Court for reversing a conviction returned by a jury corrupted by newspaper accounts relating to the trial. In *Marshall v. United States,* 360 U. S. 310 (1959), the Supreme Court took it upon itself to reverse two lower courts that had refused such relief. The court observed at pages 312-313, in granting a new trial:

"The trial judge has a large discretion in ruling on the issue of prejudice resulting from the reading by jurors of news articles concerning the trial. *Holt vs. U.S.*, 218 U.S. 245, 251. Generalizations beyond that statement are not profitable, because each case must turn on its special facts. We have here the exposure of jurors to information of a character which the trial judge ruled was so prejudicial it could not be directly offered in evidence. The prejudice to the defendant is almost certain to be as great when that evidence reaches the jury through the news accounts as when it is a part of the prosecutor's evidence. * * * it may indeed be greater for it is then not tempered by protective procedures.

"In the exercise of our supervisory power to formulate and apply proper standards for enforcement of the criminal law in the Federal courts * * * we think a new trial should be granted."

Indeed, the Court has gone so far as to grant the writ of habeas corpus where a State convicted a de-

fendant in an atmosphere created by the newspapers that made it impossible for him to secure a fair trial. *Irvin v. Dowd,* 366 U. S. 717, 730 (1961).

There are other recent cases in which judgments of convictions have been upset by reason of improper interference with the processes of the trial by public news media: *United States v. Accardo,* 298 F. 2d 133, (C. A. 7th 1962); *Coppedge v. United States,* 272 F. 2d 504 (C. A. D.C. 1959); *Holmes v. United States,* 284 F. 2d 716, 718 (C. A. 4th 1960). Certiorari was denied in *New York v. Bloeth,* 313 F. 2d 364 (digested in 49 A.B.A.J. 373; April, 1963, *sub nom. U. S. ex rel. Bloeth v. Denno*), leaving in effect the decision of the United States Court of Appeals for the Second Circuit that a New York state prisoner was denied a fair trial in a state court because excessive newspaper publicity tainted his jury.

So important is this point that there is now pending before the Congress a proposed statute to make meaningful the standards applied by the Supreme Court in the *Marshall, Accardo* and *Coppedge* cases, *supra,* by requiring the defendant to show only that the jury had access to evidence that would have been excluded from the trial because of its prejudicial nature. The burden would then shift to the prosecution to show that it had no adverse effect on the conduct of the trial. Senate Bill 1802, 88th Cong., 1st Session, June 26, 1963, entitled "To Protect the Integrity of the Court and Jury Functions in Criminal Cases."

We think this is only fair. Not only is the burden on the Government to prove the guilt of the defendant, but, when challenged, the burden should be on the Government to show that the defendant received a fair

trial by an impartial jury as provided by the sixth amendment of the Constitution. For, if the trial is not fair, as we contend in behalf of appellant Semler, there is automatic interference with the question of sustaining the burden of establishing guilt, so far as the Government is concerned.

Thus, we claim that appellant Semler did not receive a fair trial from an impartial jury. They were all residents of the Tucson, Arizona area and were exposed to the newspaper articles which practically convicted Mr. Semler before the trial started and continued throughout the trial until the jury convicted him.

C. Unconstitutional Mass Trial of Appellant Semler Requires Reversal of Judgment.

Appellant Semler was put to trial with 7 other defendants out of 21 who were indicted, which deprived him of a fair trial.

The Supreme Court in *Kotteakos v. United States,* 328 U. S. 750 (1946), reversed a conviction, partially upon the ground that a vast amount of legally irrelevant evidence had been admitted, tending to indicate some 8 different conspiracies, where the Indictment had charged a single confederation. The Court, speaking through Mr. Justice Rutledge, said:

> "The dangers of transference of guilt from one to another across the line separating conspiracies, subconsciously or otherwise, are so great that no one really can say prejudice to substantial right has not taken place. * * * [the defendants have] * * * the right not to be tried en masse for the conglomeration of distinct and separate offenses committed by others * * *."

The testimony indicated various groups or teams participated in the thefts at different times, all under the leadership of Sgt. Woolridge and with the knowledge of Sgt. Howell. Appellant Semler had to sit through 17 days of the trial when this testimony was brought out through witnesses to the jury. Yet the three substantive counts (Counts V, VII and X) against appellant Semler involved only three sales out of all the merchandise stolen by Woolridge and Howell and their cohorts. Even as to the three sales there was no direct testimony that appellant Semler had any knowledge of the thefts of the merchandise.

D. Instructions to Jury Were Complicated and Confusing.

If the procedure used for the selection of jurors in this case was prejudicial to appellant Semler, the procedure in instructing the jurors at the beginning of the trial and again at the end of the trial, was highly prejudicial on two counts: (1) the apparent inability of jurors to understand and absorb oral instructions in a complicated criminal case and (2) the inability of counsel to argue effectively without knowing in advance of the exact language the Court will use in charging the jury.

It is not difficult to understand that a jury of laymen would have difficulty in listening to a 2-hour oral charge and retain it. It is difficult enough for lawyers skilled and experienced in Federal criminal law to listen to an oral charge with enough intelligence to make the proper objections afterward. To expect a juror to do the same thing and then apply the law to the facts is beyond the realm of reason and results in a prejudicial proceeding against the appellant.

V.

The Court Erred in Failing to Grant Appellant Semler's Motions to Dismiss the Indictment, the Motion to Strike, the Motion for Change of Venue, the Motion for Severance and for Separate Trial, the Motion for a New Trial and for Denying Appellant's Motion for Judgment of Acquittal.

The foregoing have been covered in the preceding Assignments of Error and Argument.

Conclusion.

A sound argument in support of Appellant's position is contained in the whole record if approached and reviewed with a calm objective. It is a large record to review, yet the issues are grave involving, as they do, a severe loss of liberty. Perhaps it is with this sense of urgency that the arguments made herein have been presented at such great length.

Appellant respectfully urges that the Court reverse the conviction and remand the case to the Court below to be disposed of in a manner to meet the standards of fairness and justice required to give Appellant Semler a fair trial before an impartial jury.

Respectfully submitted,

DAVID M. RICHMAN,
Attorney for Appellant.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

DAVID M. RICHMAN,
Attorney for Appellant.

APPENDIX.

United States Statutes 18 U. S. C. A.

§371. *Conspiracy to commit offense or to defraud United States.*

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. June 25, 1948, c. 645, 62 Stat. 701.

§641. *Public money, property or records.*

Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof; or

Whoever receives, conceals, or retains the same with intent to convert it to his use or gain, knowing it to have been embezzled, stolen, purloined or converted—

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both; but if the value of such property does not exceed the sum of $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

The word "value" means face, par, or market value, or cost price, either wholesale or retail, whichever is greater. June 25, 1948, c. 645, 62 Stat. 725.

United States Constitution.

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Index of Exhibits.

Code of abbreviations: "Id." marked for identification.
"Evid." admitted into evidence.

Exhibit No.	Description	Page Id.	Page Evid.
For the Government			
1	Map	—	75
2	DD Form 1150-1	112	
3-A, 3-B, 3-C, 3-D	Aircraft Inventory Records	250	255
4-A, 4-B, 4-C	A—Excess & Surplus Prop. Turn-in Document	291	
	B—Sale of Gov't Prop. Bid page	291	
	C—Reprocessing of Property Report for Sale Action	291	
4-B	Sale of Gov't Property Bid Page		315
4-C	Reprocessing of Property Report for Sale Action		323
5	Survey	464	475
6, 7, 8	Maintenance Records Report (2 parts) & Final Inspection	479	489
9	Record of Gov't property installed aboard aircraft	494	501
10	Investigative Report	569	
11	Work Order	598	603
12	Inquiry Card	805	810
13	Technical Order	817	821
14	Technical Order	817	821
15	USAF Publications Catalogue	819	823
15A	Page from Exhibit 15	823	824
15B	Page from Exhibit 15	819	823
16	USAF Publications Catalogue	820	823
16A	Page from Exhibit 16	824	825
17	Defendant Ward's Statement	883	885

Newspaper Articles.

THE ARIZONA DAILY STAR

November 8, 1962

Top Suspect Nabbed in Calif.

GRAND JURY INDICTS 13
IN D-M THEFT PROBE

6 Arrested In Tucson;

2 Found In Pima Jail

Bulletin: An armed suspect in the Davis-Monthan AFB theft rings has been arrested in Brooklyn, the FBI announced last night in Phoenix. Agents nabbed James E. Walston at his home. He was armed with a .30 caliber rifle but offered no resistance. Walston is being held in the Federal House of Detention in New York City, the FBI said.

By Bob Thomas

Thirteen men were charged yesterday in a secret grand jury indictment with thefts of radio communication equipment from Davis-Monthan AFB as the FBI expanded its investigation to other states.

Agents from Tucson and Phoenix arrested six of the suspects in Tucson yesterday. Two more were located in Pima County Jail, where they were being held on unrelated state charges.

In North Hollywood, Calif., FBI agents arrested Norman Nathan Semler, described as the "Mr. Big" of the theft ring.

Semler, 43, is president of Semler Industries Inc., which sells electronic and photographic equipment on an international scale, and reportedly has a gross of $1 million a year.

Edward Boyle, in charge of the Arizona FBI office, said that since the case broke last July, agents have arrested 19 men. Two men, named in the grand jury indictment yesterday, remained at large last night.

Investigators have connected the 21 men with the theft of $269,000 worth of radio and navigational equipment from D-M and Luke AFB, near Phoenix, Boyle said.

U. S. Atty. Carl A. Muecke said last night he believes that the 13 persons indicted yesterday should account for the entire theft ring.

However, he said questioning of the suspects could lead to other arrests.

Muecke, who spearheaded the investigation, alleged that Semler, a resident of swank Sherman Oaks, Calif., flew to Tucson to pick up stolen government equipment.

After processing the equipment in his plant, the stolen items were sold to other parties, Muecke said. Semler did business with Spain, Formosa and West Germany but Muecke said he had no knowledge that he ever sold any of the equipment—some of it the latest, classified types—to any Iron Curtain country.

"But that's not saying some of it didn't eventually end up in Red hands," Muecke said.

* * * * *

Bond was set for $25,000 for Semler when he appeared before a U. S. Commissioner in Los Angeles.

The 13 men are charged in an 11-page indictment with 10 counts of theft of government property, receiving stolen government property and conspiring to receive stolen government property.

McKal, who read the indictment in full to the suspects, said it was one of the longest indictments he had seem.

In it, a story of intrigue was told.

Sextants, radio receiver-transmitter sets and radio receivers allegedly were stolen from planes parked in the 2704th Aircraft Storage and Disposition Group area by the suspects, who climbed under and over the fence at night.

Some of the suspects, who worked in the storage yard, allegedly would leave the equipment to be stolen in a convenient place.

Once 10 radios were retrieved from under cactus plants just outside the D-M fence, where they had been hidden earlier.

A trailer was rented by one of the suspects to store the stolen radios until they could be disposed of, the indictment charged.

The suspects allegedly were paid $200 to $400 for each delivery. The FBI said Semler purportedly paid $65,000 for the stolen equipment he received.

ARIZONA CITIZEN
January 15, 1963

'Systematic Looting'

'ELABORATE CODE' USED IN D-M THEFTS, SAYS PROSECUTOR

By Eric Cavaliero

The government prosecutor told a U. S. District Court jury yesterday that seven defendants used an elaborate code system in the "systematic looting" of Davis-Monthan Air Force Base.

The trial of California businessman Norman N. Semler and six others charged with involvement in the theft from D-M of government property valued at $200,000 opened yesterday before Judge James A. Walsh.

In his opening statement, U. S. Atty. Carl A. Muecke said the seven-woman, five-man jury would hear during the course of the trial how defendants worked out a system of using apparently innocent words to describe such items as radios and sextants in an effort to mask their activities.

"When one of the conspirators wanted to say, "I want a certain thing," he would use some such term as " 'suitcase,' " Muecke explained. "This would tell his co-conspirator the exact number of packages required and the exact size.

"You will hear how the co-conspirators put them into the desert, put lables on them and how they were received at the other end by Semler," Muecke added.

"You will have testimony on how three radios with serial numbers went all the way through the Air Force and into Semler's hands," he said. "You will hear

how a lady—God bless her—kept meticulous records of the work she did for Semler.

"You will hear stories of meetings in motels, payoffs in men's rooms and the transfer of goods in parking lots," Muecke added.

Muecke said there were occasions when the defendants were nearly caught after "slipping over and under fences." He said a big plane was featured in one incident.

The U. S. attorney said the fact that a man was charged with conspiracy did not necessarily mean that he knew every facet of the crime.

Earlier, in addressing the jury, Judge James A. Walsh hinted that the trial may continue for two weeks or more.

* * * * *

THE ARIZONA DAILY STAR
January 16, 1963

"Has To Be A Little Crooked"

FORMER D-M SERGEANT TESTIFIES IN THEFTS

Court Told How Equipment Was Stolen, Put On Sale

By Bob Thomas

A former Davis-Monthan AFB supply sergeant, sentenced to a year in prison two months ago for his part in the theft of government radios from D-M, testified yesterday that a man "has to be a little crooked" in order to work in Air Force supply.

The witness, former S/Sgt. John J. Milne, 29, of the 15th Fighter Sqdn. at D-M, testified yesterday for the government in the trial of seven men accused of theft and conspiracy in the D-M thefts.

Milne, dressed in civilian clothes and appearing poised and alert, told the court how he and others took radios and sextants from the D-M storage yard and sold them for cash.

The witness testified most of the day in U. S. District Court yesterday and his testimony was attacked vigorously in cross-examination by defense attorneys.

It was in cross-examination by defense Atty. J. Edward Morgan that Milne made the comment about being "a little crooked".

Morgan asked Milne if in his job as supply sergeant he had ever obtained an item from supply without the necessary paperwork.

"Quite possible," Milne cracked, "In order to be in supply you have to be a little crooked in the first place."

Milne testified he had heard in 1961 through casual conversation with S/Sgt. Louis R. Giavelli, 30, also of the 15th Fighter, that money could be made by selling Air Force radios.

Giavelli had in his possession a radio directional receiver from an Air Force plane. Milne agreed to go with Giavelli and see how the set was sold.

They loaded the set in Milne's car and drove to a nearby tavern. There they were met by another D-M sergeant, Edsel (Dixie) Howell. The men loaded the set in Howell's white Cadillac convertible. Later, Milne said, Giavelli gave him $75 for his part in the transaction.

After this introduction Milne learned from his boss, Sgt. Clint R. Wooldridge, that Howell would buy both sextants and radios.

Milne, who often visited the 2804th Storage Yard at D-M on routine business, then went to the storage area and contacted a civilian foreman, Robert Clark, 36, of 8011 E. 17th St.

Clark, Milne said, agreed to supply the wanted items in exchange for a car radio.

A number of radios and sextants were then "delivered" to Milne by Clark.

* * * * *

They had collected about "10 or 12" radios and placed them outside the fence surrounding the 2704th area when they suddenly found OSI agents (Office of Special Investigations at D-M) approaching.

The three men dashed off and escaped in the darkness. Later the next day, Milne said he returned to the area and saw the radios still beside the fence, but he didn't try to retrieve them because he feared an OSI trap.

Later that fall of 1961 Milne, Woolridge and Howell again teamed up and successfully disposed of some more radios, he said.

Howell, Milne said, supplied him with a written "order" list of desired equipment. Milne gave the list to Clark and the foreman later delivered a radio set to Milne. For this Clark received $200, Milne said.

Giavelli, Woolridge and Dawkins pleaded guilty to theft charges last year and were sentenced. Giavelli and Wooldridge each received a year in prison. Dawkins was placed on probation.

Last week Howell changed his plea to guilty and he will be sentenced after the trial.

Milne stuck to his story through the strong cross-examination later.

Also testifying yesterday was Jack Kelley, of 3326 E. 24th St., and Kenneth C. Thomas, of 1313 E. Prince Rd.

Kelley, foreman of 780th Equipment Section of the 2704th, identified records for four B47 planes which an inventory showed were missing a total of eight sextants.

Thomas told of his duties as former sales officer with the 2704th.

Charles W. Chappell, chief of supplies for the 2704th, testified for an hour in the morning.

THE ARIZONA DAILY STAR
January 17, 1963

Convicted Sergeant Testifies

WITNESS LINKS OFFICER TO D-M RADIO THEFTS

Easy Money Blamed for Crime Sprees

By Bob Thomas

First Lt. Jack R. Kirvis, a supply officer for the 15th Fighter Sqdn. at Davis-Monthan AFB, was linked through testimony with three separate thefts of government radios yesterday in U.S. District Court.

Kirvis, 29, is one of seven men on trial for stealing equipment from Davis-Monthan.

For the second straight day, a 15th Fighter Sqdn. staff sergeant told a story of how a desire for easy money caused some members of the 15th to commit brazen nighttime thefts from Air Force planes.

Staff Sgt. Louis R. Giavelli, 30, said he, Lt. Kirvis, and Staff Sgt. Clint R. Woolridge, 31, climbed the chain-link fence of the "fly-away" area just 800 yards from Main Gate (manned by Air Police guards) and stole radios from three parked F86 jet fighters and a storehouse.

Giavelli, who pleaded guilty to theft of government property last August and received a sentence of one year, was a government witness. He is presently on parole from a federal prison.

Dressed in civilian clothes, Giavelli laconically related a tale of intrigue among members of the 15th Fighter supply.

Last year, over coffee in a base cafeteria, the three airmen planned a night foray into the fly-away area, a large open section of runway where planes scheduled to leave the base are parked.

In April, 1962, they climbed over the high fence and broke into three parked F86 jets, stripping them of their radio sets.

Then, Giavelli testified, Woolridge broke some glass in a nearby building and opened a door. All three men entered the building and removed two radio sets.

Woolridge again broke into another building close by and the men took three more sets.

They hauled the eight radios to the fence and lifted them over one by one and then loaded them into Woolridge's car. For his part Giavelli said he received $400 from Woolridge.

There was some confusion on how much certain types of radio sets cost. Earlier one witness testified the "acquisition cost" of 14 radios was $51,170.

Kirvis was involved in two other thefts during March, 1962, Giavelli said.

During the first half of the month Giavelli said he and Lt. Kirvis climbed over a fence in the 2704th storage area on the base and took six radio sets from parked B47 jet bombers.

They handed these radios over the fence to where Sgt. Woolridge was waiting and then helped him to load the sets in his car. Woolridge later paid him $125 to $150, Giavelli said.

Two weeks later the three servicemen returned to the same area and removed 20 radios from parked

planes. Eight of these were put into Woolridge's car, Giavelli said.

He testified he did not know what happened to the remaining 12 radios. Woolridge paid him between $200 and $300 for his part in these thefts, Giavelli said.

According to Giavelli, it was Sgt. (now retired) Edsel (Dixie) Howell, 43, who first persuaded him in 1961 to steal aircraft radios and exchange them for cash.

Giavelli said he stole a radio directional receiver that Howell wanted and asked Sgt. John J. Milne, 29, also of the 15th Fighter Sqdn., to help transport the radio set to Howell.

Using Milne's car they drove to a tavern near the base and transferred the radio to Howell's white Cadillac convertible. Giavelli said he received $150 from Howell for the radio and that he split this with Milne, giving him $75.

THE ARIZONA DAILY STAR
January 18, 1963

COAST MAN LINKED TO D-M THEFTS

Repair Firm's Records Given

By Eric Cavaliero

"You will hear how a lady—God Bless her—kept meticulous records of the work she did for Norman Nathan Semler."

U.S. Atty. Carl A. Muecke used these words Monday in his opening statement to a U.S. District Court jury trying California businessman Semler and six other men charged with involvement in the $200,000 Davis-Monthan Air Force Base thefts.

Yesterday the woman, Mrs. Lucille Andre, operator with her husband of Air Electronic Co., of North Hollywood, Calif., became the first witness to link Semler with the theft ring.

Mrs. Andre said her company did service work on radios for Semler's firm, Semler Industries Inc., of North Hollywood, which sells electronic and aerial photographic equipment around the world.

She said her records, kept at the request of the Federal Aviation Agency, showed that three radios the company repaired for Semler had identical serial numbers to equipment stolen from D-M last May.

One of the serial number she mentioned was G-12477.

Corroborative evidence came from Master Sgt. Robert Joseph Volpe, in charge of repair of radio equipment for the 15th Fighter Squadron at D-M.

Volpe said he was notified at 4 a.m. last May 26 that a repair shop on the flight line had been broken into. Two radios were missing.

There was tension in the court as Volpe added: "I remember the serial number on one of them—it was G-12477."

Volpe explained: "I remember it because I am responsible for all the equipment in that shop. If something is missing, I have to make it up."

Leon C. Lucas, a radio technician with the 2704th Storage & Disposition Group at D-M, said he was called out to the repair shop early in the morning of May 26.

"There were quite a few people milling around in the hallway," he said, "including air policemen and men from the Office of Special Investigation."

"The window on the lower left hand side, in the approximate position where the lock is, was broken," he added. "There was broken glass lying on the floor, and two radios were missing."

He said panels had been taken off planes in the nearby storage yard.

The removed panels, on the left hand side of the nose, were the main access to the two pieces of equipment, he added.

Airman 1.C. William J. McCarty, a technician repairman with the 15th Fighter Squadron, said he remembered May 26, 1962.

"It was a Friday night and I worked late in the repair shop on the flight line," he said. "I left the shop to go on an errand to the end of the runway. When I returned, it had been broken into.

"I requested a sabotage alert as there are classified papers there," he added. "But I discovered that none of them had been touched."

* * * * *

TUCSON DAILY CITIZEN

January 19, 1963

INVOLVED IN 'DRY RUN'
3 IN D-M THEFT CASE ON PROBATION

By Eric Cavaliero

Charges against three men who have admitted conspiring in the $200,000 thefts from Davis-Monthan Air Force Base were disposed of in a few minutes yesterday when all three were placed on probation for two years.

But the government indicated that the U.S. District Court trial of California businessman Norman N. Semler and six others also charged with involvement in the D-M theft ring may continue for at least another week. There still are a number of witnesses to be called before the government rests its case.

The trial's fifth day ended at 4:30 p.m. yesterday, when the jury was dismissed until Tuesday morning. Minutes later, the three other defendants were brought into the courtroom.

They were: Garnie H. Gould, 24, of 749 N. 11th Ave., Winford W. Bibbs, 25, of Kirkwood, Mo., and Richard L. Parris, 30, of 136 S. Meyer Ave.

Judge James A. Walsh said Parris' two-year probation period will begin when he completes a four-to-five year sentence he is serving currently in the state prison at Florence for burglary. The burglary conviction was not related to the D-M case.

He told Gould: "If you don't follow the conditions of your probation, the roof may fall in on you."

The judge also briefly lectured Bibbs, pointing out that probation did not mean he was getting away with anything.

Tucson attorney Arthur W. Vance Jr., who was appointed by the court to represent all three, said: "These men were involved in a single isolated incident which was in the nature of a dry run, since no equipment was taken."

The "dry run" was referred to earlier in the day by Delevin L. Williams Jr., 19, of Philadelphia, a government witness.

Williams, who was put on probation for five years last August for his part in the thefts, said he was told in May of 1961 to drive a truck to a hangar, pick up some men and equipment and take them to a barracks. However, they had no radios with them, he added, and one of the men told him they had been unable to get them.

William Hubbs Jr., of 4013½ E. Ft. Lowell Rd., who formerly worked as a store clerk in supply for the 15th Fighter Squadron at D-M, said he was paid a total of $1,000 for 11 radios. The payoff was made at the Greyhound Bus Depot here, he added, and the money "was supposed to have come from California."

Hubbs said he delivered the radios to Staff Sgt. Clint R .Woolridge, also of the 15th Fighter Squadron. He gave $250 to Alejandro M. Munoz, 29, of 4436 E. 30th St., who helped him, he added.

Hubbs also has pleaded guilty to involvement in the thefts and currently is awaiting sentence. After taking the stand yesterday he requested—and was granted—permission to take the Fifth Amendment if

asked "certain questions" which might incriminate him. He did not explain the nature of the questions, nor did he take the Fifth Amendment during his testimony.

Defendants are: Semler, Munoz, 1st Lt. Jack Raymond Kirves, of the 15th Fighter Squadron; Ernest Gaines, 21, an airman at D-M; James E. Walston, 19, a former air policeman at D-M; Curtis I. Ward, 27, of 1603 N. 5th Ave., and Robert Earl Clark, 36, of 8011 E. 17th St.

Semler, 43, of Sherman Oaks, Calif., has pleaded innocent to four counts of conspiracy and theft of government property. His firm, Semler Industries Inc., of North Hollywood, sells electronic and aerial photographic equipment.

Other headlines in the case are as follows:

SEMLER OWES ME $17,000, SAYS FORMER D-M AIRMAN

SEMLER HAGGLED ON PRICE, SAYS FORMER D-M AIRMAN

WEALTHY CALIFORNIAN'N NAME ENTERS CASE—U.S. WITNESS SAYS SEMLER HAD RADIOS

SEMLER, D-M COHORTS FOUND GUILTY

SEMLER SENTENCED TO 2½ YEARS—AIR FORCE THEFTS

No. 18705

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

NORMAN NATHAN SEMLER,
Appellant,

vs.

THE UNITED STATES OF AMERICA,
Appellee.

Upon Appeal from the United States District Court
for the District of Arizona

BRIEF FOR THE APPELLEE

CHARLES A. MUECKE
United States Attorney
For the District of Arizona

JOHN E. LINDBERG
Assistant United States Attorney

JO ANN D. DIAMOS
Assistant United States Attorney
Attorneys for Appellee

CITATIONS

CASES

STATUTES

CONSTITUTION

AUTHORITIES

SUBJECT INDEX

No. 18705

IN THE

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NORMAN NATHAN SEMLER,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

UPON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

BRIEF OF APPELLEE

I.

JURISDICTION

This case was commenced by the return of an Indictment by the Grand Jury on November 7, 1962, (RC Item 27) in ten counts charging defendant and appellant herein, Norman Nathan Semler, plus twelve other defendants, with conspiracy to steal government property and to receive government property in one count, and charging defendant and appellant herein, Norman Nathan Semler, in Counts V, VII and X with having

received various types of stolen government radios, knowing them to have been stolen (RC Item 3). (For convenience the defendant and appellant herein, Norman Nathan Semler, will be referred to as Defendant Semler, all other defendants who were on trial in this case will be referred to as Defendant followed by the surname, and all other defendants will be referred to by their surname. The transcript of the trial will be referred to as "TR", and the transcript of the record on appeal as "RC".)

The Indictment charged Defendant Semler with violating Section 371 of Title 18, and Section 641 of Title 18, of the United States Code. (RC Item 3.)

Count I charged that from on or about May 20, 1961, to on or abount June 24, 1962, Defendant Semler and twelve other defendants conspired with eight other persons named as conspirators but not as defendants along with diverse other persons to the Grand Jurors unknown to (a) steal government property over the value of $100.00, and (b) receive stolen government property over the value of $100.00. It further charged 36 overt acts in furtherance of the same. The 36 overt acts are concernedwithelevenepisodes.Thefirstepisoolv deinv act sare concerned with eleven episodes. The first episode involves the first, second and third overt acts. The second episode involves the fourth, fifth, sixth and seventh overt acts. The third episode involves the eighth and ninth acts. The fourth episode involves the tenth and eleventh overt acts. The fifth episode involves the twelfth, thirteenth, fourteenth and fifteenth overt acts, and also the substantive charges in Counts II and III. The sixth episode involves the sixteenth, seventeenth, eighteenth and nineteenth overt acts, and also the substantive charges in Counts IV and V. The seventh episode involves the twentieth, twenty-first and twenty-second overt acts, and also the sub-

stantive changes in Counts VI and VII. The eighth episode involves the twenty-third and twenty-fourth overt acts, and also the substantive charge of Count VIII. The ninth episode involves the twenty-fifth, twenty-sixth and twenty-seventh overt acts. The tenth episode involves the twenty-eighth, twenty-ninth, thirtieth, thirty-first, thirty-second thirty-third and thirty-fourth overt acts, and also the substantive charges in Counts IX and X. The eleventh episode involves the thirty-fifth and thirty-sixth overt acts, and also constituted the end of the conspiracy.

Count V charged Defendant Semler with having received six R-540/ARN14C radio-receivers on or about March 22, 1962, personal property of the United States, each of a value in excess of $100.00, all of which personal property had theretofore been stolen as Defendant Semler then and there well knew.

Count VII charged Defendant Semler with having received twenty R-540/ARN14C Radio-Receivers on or about March 27, 1962, personal property of the United States, each of a value in excess of $100.00, all of which personal property had theretofore been stolen as Defendant Semler then and there well knew.

Count X charged Defendant Semler with having received seven RT-263/ARC 34 Radio Receiver-transmitters and one R-540ARN/14C Radio-Receiver, on or about May 26, 1962, personal property of the United States, each of a value in excess of $100.00, all of which personal property had theretofore been stolen as Defendant Semler then and there well knew.

On November 16, 1962, Defendant Semler was arraigned. Defendant pleaded not guilty as charged in Counts I, V, VII

another airman, Sergeant Edsel Dakalb Howell, at Davis-Monthan Air Force Base (TR P 391 L 19 to P 392 L 14). Sergeant Howell asked Giavelli if he could get an ARN 21 navigational aid for a friend (TR P 393 L 19 to P 394 L 5). Giavelli arranged to have Sergeant John Milne pick one up and (TR P 395 L 1-10) Sergeant Milne does not recall how it was obtained (TR P 169 L 16-17). Giavelli and Milne drove to the Runway Bar in Tucson, Arizona, and put the set in Howell's car (TR P 396 L 10-21). Giavelli was paid $150.00 by Howell and Giavelli gave half to Milne (TR P 397 L4-21; P 173 L 23 to P 175 L 2).

Mrs. Helen Schowalter testified no ARN 21 had been sold by the 2704th Air Force Storage and Disposition Group at Davis-Monthan Air Force Base in the calendar year 1961 (TR P 471 L 7-15). Defendant Semler was on the mailing list which received the catalogs put out by the 2704th (TR P 2223 L 14-18).

(Second Episode) On or about July 17, 1961, Defendant Clark delivered eight (8) sextants and two (2) ARN 21 radios to shed at Building 4853 on Davis-Monthan Air Force Base (TR P 179-181). Exhibits 3a, b, c and d indicate U.S. Air Force planes, which were in the salvage area of Davis-Monthan at the time, had had two sextants each, but that the sextants were no longer on the aircraft and had been removed without authority by the testimony of Jack Kelley (TR P 256-258).

Mr. Charles W. Chappell, an employee of the 2704th, testified that prior to July 17, 1961, there were no records kept of any of the equipment (TR P 110 L 5-13).

Sergeant Milne and Sergeant Wooldridge transported them to a rented trailer at the Ace Hi Trailer Court on Speedway Boulevard in Tucson, Arizona, (TR P 181 L 12 to P 182 L6). Sergeant Howell looked at them (TR P 1265 L 6 to P 1266 L 4). Milne and Wooldridge borrowed a car, stopped at Defendant Clark's house and delivered them to Sergeant Howell (TR P 2506 L 5 to P 2508 L 11), who called Defendant Semler, shipped them to Defendant Semler (TR P 1266 L 5 to P 1267 L 7).

(Third Episode) On or about the 20th day of September, 1961, Sergeant Milne and Sergeant Wooldridge went with Duane Leroy Dawkins to the T-33 aircraft parked in Area 1 of the 2704th, which is near the Wilmot corner of Davis-Monthan and obtained ten (10) arn 14C (TR P 184 L 18 to P 186 L 15; P 1493 L 13-25).

Sergeant Wooldridge started stacking them in the desert outside the fence (TR P 1494 L 2-5). Wooldridge was scared by a car and they left (TR P 186 L 13 to P 187 L 10), and left the radios there (TR P 187 L 16-18; P 1494 L 6-12).

William Curtis, an employee of the 2704th, found them in the desert (TR P 475 L 24 to P 476 L 18), and performed a survey of the T-33 and found ten (10) ARN 14C radios missing (TR P 460 L 1 to P 462 L 7; P 464 L 22 to P 466 L 24; P 475 L 13-16, Exh. #5).

(Fourth Episode) On or about October 10, 1961, Sergeant Milne testified that Defendant Clark placed one ARN 21 in the truck Milne was driving (TR P 189 L 4 to P 190 L 22). Milne paid Defendant Clark $200.00 after being paid by Sergeant Howell (TR P 190 L 23-24). Charles W. Chappel testified an ARN 21 was found missing from his building where

Defendant Clark was employed over the Labor Day weekend (TR P 111 L 5 to P 112 L 7; P 126 L 9-13).

(Fifth Episode) On or about January 26, 1962, the 2704th area began the preparation of a catalog to list surplus parts for sale. Fourteen (14) ARC 33 radios were to be listed in the catalog for bid (TR P 299 L 9 to P 303 L 9, Exh. #4b). Sergeant Howell testified that Defendant Semler told him where the ARC 33's were in the disposal yard (TR P 1274 L 12 to P 1275 L 8). Howell directed Defendant Ernest Gaines to go and get them (TR P 1275 L 13-15; P 633 L 8-10). Williams, with Defendant Gaines and Defendant Walston went to the disposal yard, placed the radios on a stand (TR P 628 L 24 to P 634 L 17). Williams and Defendant Gaines returned Defendant Walston to work (TR P 635 L 10-14) and they went to town, picked up Defendant Ward (TR P 635 L 16 to P 636 L 7), returned to the stand and wheeled it across to where their car was parked (TR P 636 L 12-15) and called Sergeant Howell at 7:15 A.M. when Sergeant Howell was at work (TR P 636 L 17-19), delivered them to the desert drop area (TR P 1275 L 13-25; P 636 L 13-14), and Sergeant Howell either shipped them to Defendant Semler or Defendant Semler came and got them (TR P 1276 L 22 to P 1277 L 23; Exh. #30, Purchase Order #1739).

(Sixth Episode) On or about March 20, 1962, by the testimony of Sergeant Giavelli and Sergeant Wooldridge, Defendant Kirves went with Sergeant Giavelli and Sergeant Wooldridge into Areas 9, 10, 11 and 12 of the 2704th area where some B-47 aircraft were parked and obtained six (6) ARN 14C radios (TR P 398 L 18 to P 406 L 16; P 1464 L 18-23; P 1535 L 17 to P 1536 L 7). Sergeant Wooldrdige delivered them

to the desert area near Sergeant Howell's home (TR P 1465 L 1-5). In a couple of days, by Sergeant Wooldridge's testimony and Sergeant Howell's testimony, Sergeant Wooldridge went with Sergeant Howell, in Sergeant Howell's pickup which was loaded with the six (6) ARN 14C radios to the Sands Motor Hotel parking lot and parked the pickup and went across the street to the Desert Inn Motel (TR P 1455 L 21-25; P 1285 L 9-24). Sergeant Howell testified Defendant Semler had arranged a code by which Sergeant Howell could identify what Howell had obtained so that Defendant Semler could know what had been obtained so that he could bring the correct size of packing cartons for the radios and sextants (TR P 1272 L 25 to P 1273 L 6; P 1285 L 6-8; P 1568 L 2-25). The purpose of the code was that Semler did not want his secretary to know what was going on (TR P 1273; 1586; 1595). Defendant Semler drove to the parking lot, packed and crated the radios, and placed them in a car he was driving (TR P 1455 L 25 to P 1457 L 9; P 1285 L 24 to P 1286 L 5). Defendant Semler walked across the street, entered the lobby and went to the men's rest room and was joined there by Sergeant Howell and Sergeant Howell received $1800.00 (TR P 1457 L 11-16; P 1286 L 6-18). Sergeant Howell returned and paid Sergeant Wooldridge (TR P 1457 L 17-23; P 1286 L 18 to P 1287 L 10).

(Seventh Episode) On or about March 27, 1962, by the testimony of Sergeant Wooldridge, Pedro Leyva and Juan Ybanez, Sergeant Wooldridge got Leyva and Ybanez to help him (TR P 1463 L 12-15; P 897 L 9-14), and Defendant Kirves remove twenty (20) ARN 14C radios from the B-47 parked in Areas 9, 10, 11 and 12 of the 2704th (TR P 1454 L 16-17; P 899 L 20 to P 909 L 7; P 933 L 5 to P 936 L 17). (William Curtis testified as to a survey of these areas, 9, 10, 11

and 12, which indicated more than twenty-seven (27) ARN 14C radios missing in April, 1962 (TR P 462 L 12 to P 464 L 20). Defendant Kirves went with Sergeant Wooldridge to deliver the twenty (20) radios to Sergeant Howell in the desert (TR P 936 L 13-19; P 1453 L 17 to P 1454 L 25). A couple of days later, by the testimony of Sergeant Howell and Sergeant Wooldridge, Howell and Wooldridge went, in Howell's pickup loaded with the twenty (20) radios covered by old tires, to the Tucson Municipal Airport (TR P 1287 L 11 to P 1288 L 3; P 1487 L 14-15). Wooldridge was introduced to Defendant Semler (TR P 1486 L 11 to P 1487 L 7). They drove to the Airport Inn and Howell got in Defendant Semler's car (TR P 1283 L 3-4; P 1491 L 7-18). Howell argued with Defendant Semler about money (TR P 1283 L 4-21; P 1491 L 21 to P 1492 L 2). Defendant Semler left in a rented car with the radios (TR P 1491 L 14-16).

(Eighth Episode) On or about April 21, 1962, William Hubbs went to a cafe named Denny's across the street from where Defendant Munoz worked and met Defendant Munoz there (TR P 711 L 5-13). They made plans, and after midnight Hubbs went with Defendant Munoz to Building 5111 on Davis-Monthan where Defendant Munoz also worked and obtained seven (7) ARN 21 radios (TR P 711 L 19 to P 714 L 20) which Sergeant Wooldridge had arranged (TR P 1478 L 3 to P 1479 L 4). Four (4) radios were placed in Hubbs' car and three (3) radios were placed in Munoz's car (TR P 716 L 20-25). Munoz and Hubbs delivered them to Wooldridge in the desert (TR P 717 L 5 to P 719 L 17; P 1479 L 23 to P 1483 L 6).This date was fixed by the fact that it was Good Friday and Hubbs remembered it was the night of a party (TR P 752 L 20 to P 753 L 1).

(Ninth Episode) On or about May 9, 1962, by testi-

mony of Delevin Leon Williams, Jr. and Sergeant Louis Raymond Giavelli, Defendant Walston drove Defendant Ward, Defendant Gould, Defendant Bibbs and Defendant Parris to the Sand and Spur Bar, which is at the main entrance to Davis-Monthan Air Force Base, and met Sergeant Giavelli, who drove them to the big C-124 in the 2704th area on Yuma Road (TR P 1123 to P 1128 L 25). Defendant Ward, Defendant Gould, Defendant Bibbs and Defendant Parris went into the 2704th area and went to Building 7401, the "Million Dollar" hangar, and tried to break in. When they could not they returned to Yuma Road by the big C-124. Sergeant Giavelli had arranged for Delevin Leon Williams, Jr. to pick them up and they returned home (TR P 641 L 15 to P 645 L 5; P 1120 L 6 to P 1130 L 14).

(Tenth Episode) On or about May 25, 1962, by the testimony of Giavelli and Wooldridge, Defendant Kirves and Giavelli climbed the fence across from Building 2702, not the Chevron area, and obtained three (3) ARC 34 radios from three (3) F-86L airplanes that were parked there (TR P 410 L 13 to P 411 L 23; P 1466 L 12 to P 1467 L 12; the record of the equipment on two of these three F-86 airplanes containing the serial numbers of the ARC 34 radios was admitted into evidence, Exh. #6 and 8). While they were doing this, Wooldridge broke into Building 2702, Defendant Kirves and Giavelli joined him and they obtained one (1) ARC 34 radio and one (1) ARN 14 radio from Building 2702 (TR P 411 L 24 to P 413 L 7; P 1468 L 19 to P 1470 L 14). Sergeant Joseph F. Childers, a base police investigator, testified to the investigation on May 26, 1962, of a break-in of Building 2702 (TR P 568 L 22 to P 577 L 8). Eon C. Lucas testified to a ARC 34 radio and ARN 14 missing from Building 2702 on May 26, 1962 (TR P 553 L 2 to P 563 L 13). After the

break-in of Building 2702, Wooldridge, Giavelli and Defendant Kirves went to Building 4853 on Davis-Monthan and broke in and there they obtained three (3) ARC 34 radios (TR P 413 L 8-18; P 1470 L 15 to P 1471 L 3). One of these radios had a repair form which was left behind, and Sergeant Robert J. Volpe remembered the serial number of the ARC 34 which was found missing when he returned to Building 4853: G12477 (TR P 584 L 17 to P 588 L 2). Giavelli left them (TR P 413 L 17-18) and Wooldridge and Defendant Kirves went to deliver the seven (7) ARC 34 and the one (1) ARN 14 radios to Howell, stopping on the way to call Howell (TR P 1290 L 1-18; P 1471 L 3-6). Wooldridge recalled neither had a dime and that they used a quarter to call Howell from a pay phone (TR P 1471 L 9-12). Defendant Kirves and Wooldridge delivered the radios to Howell in the desert near Howell's home (TR P 1290 L 19 to P 1291 L 19; P 1471 L 1-19). A day or two later Sergeant Wooldridge went to Sergeant Howell who called Defendant Semler (TR P 1291 L 19- 23; P 1471 L 24 to P 1472 L 13). Two days later Wooldridge and Howell met Defendant Semler at the Tucson Municipal Airport and they went into the desert and packed them (TR P 1472 L 15 to P 1476 L 4). Defendant Semler shipped them by American Air Freight (See the twelfth bill from the bottom in Government's Exh. #32). This date is fixed by the car rental by Defendant Semler (See the Hertz Rental Agreement dated May 27, 1962 in Defendant Semler's Exh. #I). Mrs. Lucille Andre, whose husband's firm did repair work for Defendant Semler in Los Angeles, kept a work sheet of the repairs on these radios (TR P 600 L 11 to P 604 L 6; Government's Exh. #11) which had the same serial numbers as the serial number recalled by Volpe and the two serial numbers of the three taken off of the F86's. Defendant Semler had a purchase order for these seven (7) ARC 34

and one (1) ARN 14 radios (Government's Exh. #30, Purchase Order #1787).

(Eleventh Episode) On June 23, 1962, Wooldridge and Giavelli had arranged to meet at Phoenix, Arizona (TR P 1502 L 1-4). Wooldridge arranged also with Gary Duane Rowe (TR P 1502 L 4-5). All three went to Luke Air Force Base, broke into a building at that base, and obtained radios. In getting away from Luke, they were spotted (TR P 1503 L 4 to P 1505 L 13). Giavelli returned to Tucson with the radios and reported to Howell (TR P 1316 L 14-22). Howell called Defendant Semler and told him what he had (TR P 1316 L 22-23). Defendant Semler arrived in Tucson and rented a car (Government's Exh. #38), but Defendant Howell was afraid and did not meet him (TR P 1316 L 23 to P 1317 L 7). Wooldridge and Rowe were arrested (TR P 1505 L 13).

(The evidence, such as the statements and confessions of the other defendants, which was admitted only as to the respective defendants and which is not concerned in the appeal of Defendant Semler, is therefore not included in the counter-statement of facts).

III.

OPPOSITION TO SPECIFICATION OF ERRORS

1. The evidence was sufficient to sustain a conviction of Defendant Semler on Counts I, V, VII and X.

2. The Court properly permitted the witness Edsel Kekalb Howell to invoke the privilege of the Fifth Amendment.

3. Defendant Semler was provided with a fair trial and impartial jury.

4. There is no argument on Defendant Semler's fifth specification of error that the Court erred in failing to grant Defendant Semler's Motion to Dismiss the Indictment and the Motion to Strike and therefore the issue has not been raised.

IV.

SUMMARY OF ARGUMENT

1. The evidence was sufficient to sustain a conviction of Defendant Semler on Counts I, V, VII and X.

2. The Court properly permitted the witness, Edsel Kekalb Howell, to invoke the privilege of the Fifth Amendment for the reason that the testimony of the said Howell, who was subpoenaed as a witness by the Government, was limited, on direct examination, to the period of the conspiracy and the substantive counts as alleged in the Indictment and to the acts and charges as alleged in the Indictment, and, therefore, the question on cross-examination by Defendant Semler's counsel as to other thefts of Government property or sales of stolen Government property from 1957 to June, 1962, was not material to the issues of this case, beyond the scope of direct examination and not a proper impeaching question.

3. The Court provided Defendant Semler with a fair trial and impartial jury.

4. A mere statement that the Court erred in failing to grant Defendant Semler's Motion to Dismiss the Indictment and Motion to Strike does not raise the issue with nothing more on the record, or in the Opening Brief.

V.

ARGUMENT

1. THE EVIDENCE WAS SUFFICIENT TO SUSTAIN A CONVICTION OF DEFENDANT SEMLER ON COUNTS I, V, VII and X.

One of the rules on reviewing evidence on appeal is that the Appellate Court will review the evidence in the light most favorable to the prevailing party. *Souza v. United States,* (9th Cir., 1962), 304 F. 2d 274 at p. 277; *Bolen v. United States,* (9th Cir., 1962), 303 F.2d 870 at p. 874.

In Appellant's counsel's opening brief counsel cites only from Defendant Semler's testimony to indicate that Defendant Semler was not aware that the property was stolen (page 22 of opening brief citing 2221 of the transcript of the testimony, which is Defendant Semler's testimony).

This is not the rule on appeal. The rule is all the evidence presented at the trial, whether for or against Defendant Semler, should be reviewed in a light most favorable to the Government. *Souza v. United States,* supra; *Bolen v. United States,* supra. In the opening brief of Defendant Semler, there is no attempt to review all of the evidence. All that is devoted to it is one paragraph on page 22 of the brief.

The rule by which evidence in a conspiracy is considered, as was stated by the Court in its instructions (TR P 2569 L 19 to P 2571 L 13 and P 133 L 16 to P 137 L 10) is that first the jury must find that a scheme or plan existed among the persons charged as conspirators and that an act knowingly done and the statements knowingly made during the continuance of the arrangement between them and in furtherance of an object or purpose of the common plan, may be considered as evidence against all the conspirators. *Marino v. United States* (9th Cir., 1937) 91 F.2d 691.

Summarizing the evidence generally, it was to the effect that the conspiracy was ultimately organized into a breakdown of functions, the order for a type of equipment was placed, the order was passed on, a car would be supplied to transport, a second group would handle the delivery to the drop area, and some one else handled the packaging and shipping. There was even evidence that specific items would be ordered, such as the ten ARC-33, which were in a bin in the salvage yard of the 2704th (TR P 1275 L 1-6).

(The evidence of the ownership of the property and the value of the property will not be referred to. At the time of the motion for directed verdict of acquittal (TR P 2523), the evidence as to ownership and value was not questioned, much less earnestly disputed throughout the trial. It was not raised in the Motion for New Trial, nor in Appellant's Opening Brief. Therefore, Appellee will not review that portion of the evidence.)

The evidence by defendants was as follows: The oral admissions of Defendant Kirves were not controverted by Defendant Kirves, who did not take the stand before the jury

(Special Agent Bert Mereness testified to his oral statement, (TR P 1005-1008). Defendant Munoz took the stand and denied going to Base Supply, Building 5111, on the evening of April 20, 1962, and meeting Wooldridge (TR P 1704-1736, 1739-1772). Defendants Walston, Gaines and Ward took the stand and denied their written statements (TR P 1797-1828; 1828-1840; 1840-1891, respectively). Defendant Clark and his wife denied giving any equipment to Milne or Wooldridge (TR P 1962-2011; 2011-2018, respectively) and Defendant Clark denied receiving any money. He did admit receiving a radio (TR P 1976 L 18-20). Defendant Semler took the stand and denied he knew the property was stolen (TR P 2221) and Mrs. Semler testified to receiving long distance calls from Edsel Dekalb Howell at their home (TR 2419). Defendant Semler's employees testified to his kindness and generosity (TR P 2371), and to the records of Semler Industries, Inc. (TR Belle Fettman, 2368-2379; June Robinson, 2380-2413). There were character witnesses for Defendant Kirves (James E. Freytag, TR P 1641-1644; David Lundmark, TR P 1644-1647, plus list of witnesses the Government stipulated would testify to good reputation); Defendant Munoz (Leonard H. McCarthy TR P 1700-1704; Zeke Bejarano, TR P 1736-1739; Sol Anina TR 1772-1777; Delmar Michaelson, TR P 1778-1779); Defendant Clark (E. G. Huff, TR P 1897-1900; John Gemrose, TR P 1900-1912; Junior Armstrong, TR P 1912-1914; Eldon H. Young, TR P 1914-1915; John Alvin O'Brien, TR P 1940-1951; Charles Cole, TR P 1959-1961; Lionel Lopez, TR P 1961-1962) and for Defendant Semler (Jerry Senft, TR P 2025-2032; Conwell E. Keller, TR P 2138-2141 — never heard anything bad about Semler's reputation and never heard anything good; Carl Schaeffer, TR P 2141-2145; Darwin Kindred, TR P 2145-2149; Theodore Bruce Baker, TR P 2151-2153; John Simon Fluor, TR P

2170-2171; David Araan, TR P 2366-2368). A witness was called by Defendant Kirves, John McKenzie, (TR P 1649-1652) who testified Wooldridge's reputation for truth was not too good. Impeachment by all the Government witnesses was given by bringing out on cross-examination of them that John J. Milne pleaded guilty to, was convicted of a felony, and sentenced, to-wit: stealing the eight sextants and two ARN 21 units described in Overt Acts 4, 5, 6 and 7 of Count I, i.e., the second episode (TR P 207-208); that Louis Raymond Giavelli pleaded guilty to and was convicted of a felony, to-wit: stealing the seven ARC 34 and one ARN 21 described in Count IX, and Overt Acts 28 through 34 of Count I, i.e. the tenth episode (TR P 424-426); that Delevin Leon Williams, Jr. pleaded guilty to and was convicted of a felony, and placed on probation, to-wit: stealing six ARN 14C on April 23, 1962, Defendant Clark's Exhibit B in evidence (TR P 690-691); that William Hubbs, Jr. pleaded guilty to a felony and had not been sentenced, yet, to-wit: stealing seven ARN 21 units as described in Count VIII and Overt Acts 23 and 24 of Count I, i.e., the eighth episode (TR P 735); that Juan Joel Ybanez pleaded guilty to and was convicted of a felony and placed on probation, to-wit: stealing twenty ARN 14 units as described in Count VI and Overt Acts 20, 21 and 22 of Count I, i.e., the seventh episode (TR P 982); that Pedro Leyva pleaded guilty to and was convicted of a felony and placed on probation, to-wit: stealing twenty ARN 14 units as described in Count VI and Overt Acts 20, 21 and 22 of Count I; i.e., the seventh episode (TR P 1002); that Edsel Dekalb Howell pleaded guilty to Count I of the Indictment and that Counts III, V, VII and X were dismissed as to him (TR P 1337); and that Clint Roger Wooldridge pleaded guilty to and was convicted of a felony and sentenced, and paroled, to-wit: of stealing ten ARC 34 units as described in Overt

Acts 35 and 36, i.e., the eleventh episode (TR P 1588). This, then, was the evidence as submitted by the defendants to controvert the Government's case.

(It should be noted that before discussing the evidence as submitted by the Government that Defendant Duane Leroy Dawkins, who pleaded guilty to Count I, was sworn as a witness (TR P 42 and 71), but the Government did not call him to testify. Defendants Garnie Henry Gould, Winford Winston Bibbs and Richard Lee Parris pleaded guilty to Count I, but weren't called as witnesses. Gary Duane Rowe, who pleaded to the same information as Wooldridge, i.e., the eleventh episode but was not called as a witness. The Government dismissed as to Defendant Terrell Walker on January 11, 1963, before the trial commenced on January 14, 1963. Of the twenty-one conspirators named, twenty were convicted and the Government dismissed as to the twenty-first before the trial commenced.)

The testimony of the conspiracy and substantive counts was given by Louis Raymond Giavelli (TR P 387-458, 1120-1142); John James Milne (TR P 165-247, 2494-2505); Delevin Leon Williams, Jr. (TR P 619 through 697); William Hubbs, Jr. (TR P 699-791); Juan Joel Ybanez (TR P 889-922); Pedro Leyva (TR P 922-942; 983-1005); Edsel Dekalb Howell (TR P 1248-1435); and Clint Roger Wooldridge (TR P 1443-1514; 1523-1597; 2505-2514).

Giavelli and Milne testified that in May, 1961, the latter part, Giavelli was approached by Howell to obtain an ARN 21 for a friend of Howell's (TR 391-392 and TR 173-174). Howell doesn't remember if he shipped the unit to Defendant Semler or if he came and got it (TR P 1257). Wooldridge

approached Howell in May of 1961 and asked if he could get in on the situation (TR P 1445). Wooldridge had Milne obtain eight sextants and two ARN 21 units from Clark (TR P 178-179), put them in a trailer rented at the Ace Hi Trailer Court in Tucson, Arizona (TR P 181), and ultimately delivered them to the drop area in the desert by Howell's home (TR P 182, Milne; P 2507, Wooldridge). These were either shipped to Semler or he came and got them (TR P 1266 L5 to P 1267 L 7).

About this time, Sergeant Howell couldn't recall the exact time, Defendant Semler asked him to use a code when he called because Defendant Semler did not want his secretary to know what was going on (TR P 1273). Later on Defendant Semler asked Sergeant Howell not to call him at his home since he didn't want his wife to know what was going on (TR 1281 L 1-8). This was corroborated by Sergeant Wooldridge (TR P 1586; 1595). At first Sergeant Howell would bring the radios to the Sands Motel (TR P 1262 L 15-21), but later Defendant Semler became more cautious, and they would go into the desert to pack (TR P 1279 L 15-22). On the first meeting that Sergeant Wooldridge had with Semler, Sergeant Howell had to go first and explain it was all right (TR P 1485 L 19 to P 1486 L 18).

The evidence was that Defendant Semler received the six ARN 14 radios on or about March 20, 1962, at the Sands Motor Hotel parking lot by taking the radios from Sergeant Howell's pick-up, placing them in his car, and then walking across the street to the Desert Inn to pay Sergeant Howell in the men's room (TR P 1455 L 25 to P 1457 L 23; P 1285 L 24 to P 1287 L 10).

The evidence was also that on or about March 27, 1962, twenty ARN-14 radios were delivered to Defendenant Semler when Sergeant Howell, Sergeant Wooldridge and Defendant Semler went to the desert near the Airport Inn to pack the radios (TR P 1487 L 14-18; P 1287 L 11 to P 1288 L 3).

The evidence was also that on or about May 27, 1962, Defendant Semler flew into Tucson, rented a car from Hertz (Defendant Semler's Exhibit I, for only one hour, fifty minutes) went into the desert and packed the seven ARC-34 and one ARN-14 radios and shipped by American Airlines airfreight (Government's Exhibit 32, invoice numbered 01-TUS-819964) to Semler Industries, Inc. in Los Angeles.

In other words, the evidence of Defendant Semler's knowledge was direct evidence given by Sergeant Howell for all of the period of the conspiracy as well as the substantive counts, Counts V, VII, and X, and Sergeant Wooldridge testified only for the latter part of the conspiracy and all of the substantive Counts V, VII and X. The jury chose to believe the Appellee's evidence and to disbelieve Defendant Semler.

It is respectfully submitted there was sufficient evidence to find that Defendant Semler was guilty of the conspiracy as charged in Count I of the Indictment, and of receiving stolen Government property, well knowing it was stolen, with intent to convert to his own use as charged in Counts V, VII, and X.

2. THE COURT PROPERLY PERMITTED THE WITNESS, EDSEL DEKALB HOWELL, TO INVOKE THE PRIVILEGE OF THE FIFTH AMENDMENT FOR THE REASON THAT THE TESTIMONY OF THE SAID HOWELL, WHO WAS SUBPOENAED AS A WITNESS BY THE

GOVERNMENT, WAS LIMITED, ON DIRECT EXAMINATION, TO THE PERIOD OF THE CONSPIRACY AND THE SUBSTANTIVE COUNTS AS ALLEGED IN THE INDICTMENT AND TO THE ACTS AND CHARGES AS ALLEGED IN THE INDICTMENT, AND, THEREFORE, THE QUESTION ON CROSS-EXAMINATION BY DEFENDANT SEMLER'S COUNSEL WAS NOT MATERIAL TO THE ISSUES OF THIS CASE, BEYOND THE SCOPE OF DIRECT EXAMINATION AND NOT A PROPER IMPEACHING QUESTION.

Sergeant Edsel Dekalb Howell had pleaded guilty to Count I prior to the trial and Counts III, V, VII and X were dismissed to him (TR P 1337), and was subpoenaed by Appellee to testify. Sergeant Howell testified the conspiracy began in the latter part of 1960 (TR P 1250 L 25), and defendant Clark's counsel objected (TR P 1251 L 5-8). The Appellee stated the Government was offering the testimony as to Count I (TR P 1251 L 9). The Court sustained the objection (TR P 1251 L 15-16). The rest of Sergeant Howell's testimony was concerned with the period May 20, 1961 to August, 1962, when he called Defendant Semler from South Carolina (TR 1315 L 1-18). The only divergence from this period was when, on direct examination, he stated he called Defendant Semler in May, 1961 to sell him some radios and then had to call him back after he obtained the descriptions (TR P 1255 L 9 to 1256 L 25), and then Sergeant Howell was asked how long he had known Defendant Semler and Sergeant Howell replied:

"A. I had known Mr. Semler since I had worked for him in '57, I believe it was.

"Q. Were you working for him in this period in 1961?

"A. No sir." (TR P 1257 L 13-16)

Based on this question, Defendant Semler's counsel asked as follows on cross:

"Q. (By Mr. Chandler) Now I believe you said that you left the Semler employment in '57 and your next dealings with him was in late '60, as I recall. Is that correct?

"A. That could be correct, sir. I'm not positive of the date.

"Q. As a matter of fact, Mr. Semler wrote you also from time to time, didn't he, Mr. Howell?

"MR. MUECKE: Your honor, I object. No proper foundation as to what period of time we are talking about that would make the question relevant.

"THE COURT: What period do you have in mind, Mr. Chandler?

MR. CHANDLER: May we approach the bench briefly?

"THE COURT: I think as far as this is concerned, if you will just state the period.

"MR. CHANDLER: I have in mind the period that was discussed on direct examination. That is no contact between '57 and '60.

"THE COURT: The objection is overruled, limited to that. During this period of time that you said you had no contact with Mr. Semler, that when you left his employment until late 1960, he wrote you letters, didn't he Mr. Howell?

"THE WITNESS: I don't remember ever receiving any letters, sir, *at that time.*" (TR P 1355 L 10 through P 1356 L 8, emphasis supplied).

(TR P 1355 L 10 through P 1356 L 8, emphasis supplied).

Then skilfully a few questions later at page 1359 of the transcript at line 13, Defendant Semler's counsel asks as follows and the Court rules:

"Q. Now, in connection with your relationship with Mr. Semler, you were doing business with him, were you not—

"MR. MUECKE: Your honor, I object. Not proper foundation. I don't know what period we are talking about, doing business.

"MR. CHANDLER: I don't want to ignore the ruling of the Court about the period of time, but I assume that I'm at liberty to inquire into some matters that he testified to on direct during the period of '57 to '60, and I have reference to the fact he had no dealings or relationship with Semler during that period.

"THE COURT: He may answer as to that period, but the question does not indicate in what period you mean.

'Q. (By Mr. Chandler) All right, I rephrase the question.

"M. MUECKE: Your honor, for the record, may I make a further objection? I do not recall that on direct the witness stated that he had no dealings. I recall that I attempted to go into the matter. Defense counsel made an objection to my going into it and I was foreclosed from going into this whole period, area, or what he did.

"THE COURT: It is my recollection that—and I could be wrong—but it is my recollection that he testified to having been employed by a Mr. Semler or one of Mr. Semler's firms in 1956 or 1957, and he then said he had no contact with him

until 1960. That's my recollection of it, and it is on that recollection of it that I will permit counsel to ask about it.

"MR. MUECKE: May I say this, your Honor, that I believe my question that elicited—perhaps we ought to look at the record—but my question when I was foreclosed from going into it was in 1960 or '61, what contacts did you have with Mr. Semler. In other words, I had to skip the period, because there was an objection made to going into anything prior to that period. And I just want to make the record on that, your honor.

"THE COURT: You may proceed." (TR P 1359 L 13 through P 1360 L 25).

And the door was opened to impeach Sergeant Howell on this period 1957 through 1960. Sergeant Howell testified he did not recall receiving mail, but he was not denying it. But this entire line of questioning was beyond the scope of direct, and the "II" series of exhibits of Defendant Semler are marked and Sergeant Howell was questioned about them (TR P 1361 L 14 to 1383 L 3).

Then, at Page 1386, Line 12, Defendant Semler's counsel asked Sergeant Howell if he sold to other than Semler and Sergeant asked if he could refuse to answer (TR P 1386 L 17) and the Court asked to hear the question again (TR P 1387 L 15-16) and the Court instructed the witness as to his rights (TR P 1387 L 17 to P 1388 L 11). At Page 1410 of the transcript of the testimony the Court restated the question, then Sergeant Howell invoked the Fifth Amendment, and the Court sustained the privilege. At a conference at the bench out of the hearing of the jury Defendant Semler's counsel enlarged the question for the record (TR P 1411 L 1-25) and

the Court indicated it would sustain the claim of privilege (TR P 1412 L 21-22).

In Defendant Semler's Opening Brief, he does not cite one case that meets the issue raised here (P 25-28).

The first case cited is *Rogers v. United States* (1951) 340 U.S. 367, which affirmed 179 F.2d 559. In this case Rogers had been subpoenaed to testify before a Federal grand jury in Denver, Colorado. In answer to questions put by the grand jury, Rogers stated she had been Treasurer of the Communist Party in Denver, had had possession of its records, and had turned the records over to another party. Rogers refused to identfy to whom she had turned the records over on the grounds she didn't want to harm anyone. She was committed to the custody of the United States Marshal and advised of her right to counsel. The next day Rogers was brought back into Court and then claimed the privilege of the Fifth. The Court held that she had disclosed the fact that would tend to incriminate her, she could not refuse to give the details. Further, books kept in a representative capacity cannot be the subject of a claim of the privilege. The distinction between this (Rogers) question and the question asked Howell is obvious.

In *Brown v. United States* (1958) 356 U.S. 148, affirming 234 F.2d 140, Brown was summarily held in criminal contempt. The issue arose in a suit for denaturalization of Brown for fraudulently procuring citizenship in 1946 by falsely swearing she had not been a member of the Communist Party or an affiliate organization. The Government, in its case in chief, called her (Brown) as a witness. The Government asked question unlimited in time or directed to the period after 1946. Brown invoked the privilege of the Fifth, and the Court sus-

tained the privilege. However, Brown then took the stand in her own behalf and stated that she had never taught or advocated the overthrow of the Government, or that she belonged to any organization which so advocated, that she would take up arms to fight Russia and that she believed in the Constitution. On cross-examination by the Government, she was asked: "Are you now or have you ever been a member of the Communist Party?" Brown invoked the Fifth. The Government also asked numerous questions concerning her activities since 1946, and Brown again invoked the Fifth. The Court directed her to answer. Brown refused and the Court held her in contempt. The Court held at Page 153:

> "He who offers himself as a witness is not freed from the duty to testify. The Court *(except insofar as it is constitutionally limited),* not a voluntary witness, defines the testimonial duty. See Judge Learned Hand in *United States v. Appel,* 211 F. 495." (Emphasis supplied)

The distinction here is obvious. Sergeant Howell was not a voluntary witness. He did not choose the area of disclosure. The Government (Appellee herein) did that and it was limited to the period of the conspiracy as charged in Count I (which included the period of the substantive counts) of the Indictment and to the conspiracy charged therein. Sergeant Howell was not a party, as in the Brown case, as the Court stated at page 155:

> "The witness himself, certainly if he is a party, determines the area of disclosure and therefore of inquiry."

The ruling in the Brown case was not that the mere taking of the stand waived the privilege, but that her direct testimony opened the field of inquiry.

The next and last case cited on this point is *United States v. St. Pierre* (2nd Cir., 1942) 132 F2d. 837. (Certiorari was dismissed, *319 U.S. 41,* since the case was then moot, defendant having served his term). St. Pierre was convicted of criminal contempt in refusing to answer questions put to him by a Federal grand jury. St. Pierre testified he had embezzled, and carried the proceeds across state lines. He then was asked to whom proceeds were delivered and he invoked the Fifth. Judge Hand stated at page 840:

> "Cases may perhaps arise where the testimony put forward as a waiver was so vague or general as to raise a question whether specifications can be said to be truly in amplification of it, but no such embarrassment exists here."

As was submitted before, Sergeant Howell did not open any other area on direct except the conspiracy charged in Count I. On direct, Sergeant Howell was asked:

"Q. All right. Any other persons who have been involved in any of these episodes that you have not mentioned?

"A. I didn't get that.

"Q. Any other persons you have not mentioned in your testimony today that were involved in any of these that you know about? You testified to the taking of these various sets and all the various transactions. Are there any persons you have not mentioned that were involved in these, that were involved that you have not mentioned here?

"A. Not that I know of, sir.

"Q. Did any of these defendants here tell you about any other person you can recall?

"MR. MORGAN: I object, asked and answered, the terms were broad on the question which he asked first.

"THE COURT: He may answer.

"MR. MORGAN: If he remembers.

"THE COURT: If he remembers.

"MR. MUECKE: If you remember.

"A. Yes, sir, since I saw this fellow over here sitting on the end, I found out later his name is Mr. Clark. Sergeant Wooldridge said he is the guy you got some stuff off of. Whether he did or not I don't know."

(TR P 1299 L 24 through P1300 L 20).

In Defendant Semler's Motion for New Trial (RC Item 17) Defendant Semler contended that the second to last question asked Sergeant Howell above, starting on line 2 of page 1300 of the transcript of testimony did open the area, but when read in context as set out above the reference was clearly to these episodes.

The materiality or relevancy of the question in issue is not apparent. Prior bad acts of a witness, and which are not felony convictions, who is not on trial, cannot be shown. *Wigmore on Evidence,* McNaughton Revised 1961. §2268:

> ". . . For example, in the impeachment of a witness by cross-examination to character he may be asked whether he stole from his last employer, and this fact might for that purpose be held inadmissible (§982-987 supra), though, even if it were admissible to be asked, it might still be privileged from answer."

Prior bad acts of a defendant on trial may be shown as evidence of intent. Prior bad acts cannot be used to impeach a witness, unless, of course, it is a conviction of a felony. No such conviction of sales to others by Sergeant Howell was shown. If it

were asked as a foundation question for an impeaching witness, where is the offer of proof by Defendant Semler?

In *United States v. Cardillo,* (2nd Cir., 1963) 316 F.2d 606 at p. 611, it is stated:

> "However, reversal need not result from every limitation of permissible cross-examination and a witness' testimony may, in some cases, be used against a defendant, even though the witness invokes his privilege against self-incrimination during cross-examination. In determining whether the testimony of a witness who invokes the privilege against self-incrimination during cross-examination may be used against the defendant, a distinction must be drawn between cases in which the assertion of the privilege merely precludes inquiry into collateral matters which bear only on the credibility of the witness and those cases in which the assertion of the privilege prevents inquiry into matters about which the witness testified on direct examination. Where the privilege has been invoked as to purely collateral matters, there is little danger of prejudice to the defendant and, therefore, the witness's testimony may be used against him. *United States v. Kravitz,* 3 Cir. 1960), 281 F.2d 581; *Hamer v. United States,* (9 Cir. 1958), 259 F.2d 274; *United States v. Toner,* (3 Cir. 1949), 173 F.2d 140."

It is respectfully submitted that the Court properly sustained the invoking of the privilege of the Fifth Amendment by Edsel Dekalb Howell on question submitted on cross-examination which could incriminate him and which was on a subject not gone into on direct testimony and was not material or relevant to the issues in that a prior bad act of a witness, not a party, cannot be used to impeach the witness.

3. THE COURT PROVIDED DEFENDANT SEMLER WITH A FAIR TRIAL AND IMPARTIAL JURY.

Defendant Semler made a motion for severance (RC Item 9) on which oral arguments were heard on December 10, 1962, and were denied (RC Item 10). In Defendant Semler's motion for severance (RC Item 9) Defendant Semler contended there was no relation between the substantive counts and the conspiracy count.

As was stated in the argument on the motion and Counter Statement of Facts herein, the entire Indictment was concerned with eleven episodes, the overt acts of Count I were set off by semicolon and then a period to indicate the end of an episode and the substantive counts were involved in these same episodes, i.e., Count V with the sixth episode with which Overt Acts 16, 17, 18 and 19 of Count I were involved; Count VII with the seventh episode with which Overt Acts 20, 21 and 22 of Count I were involved; Count X with the tenth episode with which Overt Acts 28, 29, 30, 31, 32, 33 and 34 of Count I were involved. In Defendant Semler's motion for severance (RC Item 9) Defendant Semler contended there was no relation between the substantive counts and the conspiracy count. In *Williamson v. United States,* (9th Cir., 1962) 310 F.2d 192 at p 197, it was held that:

> "The motion was properly denied. A general unsupported assertion of prejudice was not enough to justify the severance of counts properly joined."

This motion for severance was not renewed in Chambers before the trial commenced (RC Item 13) and was *not* renewed at the close of the Government's case (TR P 1624 L21 to P 1634 L 20), and was not renewed at the close of all the evidence (TR P 2523 L 17-24), nor in the Motion for New Trial (RC Item 17). If Defendant Semler is now contending that an alleged prejudice became apparent at the time of trial,

it is respectfully submitted that he has waived it. *Williamson v. United States,* (9th Cir., 1962), supra, at p. 197 and the cases cited in footnote 18 thereon.

In Defendant Semler's (Appellant's) Opening Brief, he cites and quotes (Appellant's Opening Brief P 29) Judge Learned Hand in *Nash v. United States,* (2nd Cir., 1932) 54 F.2d 1006, which affirmed the conviction of the lower court and found no prejudice in the joinder of the trial.

Krulewitch v. United States (1949), 336 U. S. 440, is cited for an alleged ruling at page 445 (Appellant's Opening Brief P 29). It is respectfully submitted that was not the ruling. The Supreme Court reversed a conviction, 167 F.2d 943, because the trial court admitted a complaining witness's statement to a co-conspirator made a month and one-half after the conspiracy ended and that co-conspirator was not on trial.

In *United States v. Standard Oil Co.,* (W D Wis. 1938), 23 F.Supp. 937, the trial court directed a verdict of acquittal as to a certain defendant after the jury returned a verdict of guilty as to that defendant. (This case involved the trial of forty-six defendants, and not seven as in this case on appeal).

But as was submitted before, the motion for severance has been waived.

Defendant Semler then stated in his opening brief that there was prejudicial publicity prior to trial and discusses the case of *State v. Taborsky,* (Conn. 1960) 147 Conn. 194, 158 A.2d 239, affirming 20 Conn. Supp. 242, 131 A.2d 337, in which the Connecticut Appellate Court distinguished the case from *Shepard v. Florida,* (1951), 341 U.S. 50. In the Shepard

case 46 So.2d 880 was reversed because jurors admitted reading and knowing the contents of articles which stated confessions were obtained but never introduced in trial. The opening brief then cites articles in the appendix (Opening Brief P 31, footnote 12) which are not a part of the record and which Appellee is moving to strike. He next discusses an article dated July 3, 1962, that is not in the record nor in the appendix which Appellee is also moving to strike.

On Page 33 of the Opening Brief, *Crawford v. United States* (1909), 212 U.S. 183 at p. 196, is cited and a quotation thereof taken out of context. In Crawford the defendant had challenged a juror for cause since the juror was a Government employee and the Court overruled the challenge. The quotation given on page 33 leaves out at the asterisks the prejudice of the juror on account of his relations to one of the parties.

Then *United States v. Accardo* (7th Cir., 1962) 298 F.2d 133 is cited at page 33 of the Opening Brief. In this case the Seventh Circuit reversed the trial court on three grounds, one of which was the jury should have been questioned individually and not generally.

In this case the Court questioned the jurors individually who had read or heard of the case and none of them had an opinion. Mrs. Collier (TR P 19 L 5 to P 20 L 19), who read an article the day before who could not recall the article with any clarity but just that the trial was "coming up today" (TR P 20 L 24); Mr. Watwood (TR P 20 L 20 to P 21 L 21); who read an article Friday or Saturday (TR P 20 L 25 to P 21 L 1), who could recall the details (TR P 21 L 2-6). These two were selected as jurors—TR P 47); Mrs. LaMoine (TR P 21 L 21 to P 22 to L20) saw an article in December, and saw it was in Federal Court and so did not read it and so "got

out of that quick" (TR P 22 L 8-10); Mrs. Coppola (TR P22 L 21 to P 23 L 20) who had seen something on the TV late news about three months ago but it was just something about Davis-Monthan and boys had done something. "I didn't —I don't remember the facts" (TR P 23 L 3-5); Mr. Doran (TR P 23 L 20 to P 24 L 12) who had read the original article and "heard several TV accounts since and it—just the fact the charge has been made, and I don't have any opinion as a result of that (TR P 23 L 21-24); Mrs. Perez (TR P 24 L 13 to P 25 L 6), who had scanned the article the day before who did recall the details of that article (TR P 24 L 18-20). No challenge for cause was made of these six jurors (see TR P 19 through 25), and Miss Seaney (TR P 35 L 1-6), who had read the article the day before the case was coming up and not the facts of the case. No challenge for cause was made at any time by any of the defendants of those jurors (see TR P 3 through P 64), except Defendant Semler's attorney renewed the motion for continuance and for change of venue made in Chambers (TR P 64 L 18-21, referring to RC Item 13).

In *Marshall v. United States,* (1959) 360 U.S. 310 (cited at page 34 of the Opening Brief) a conviction was reversed where three jurors read an article that appeared during the trial and the article referred to previous conviction of the defendant, who did not take the stand.

There is no evidence in the record herein or any indication at all that any of the jurors read or heard any accounts of the trial during the trial.

The quote of Judge Frank on page 34 of the Opening Brief is from the dissenting opinion in *Leviton v. United States,*

(2nd Cir., 1951) 193 F.2d 848, cert. denied, 343 U.S. 946, in which there was evidence on the record that in the jury room was found an edition of the New York Times containing an article concerning the matter, but which stated the trial involved $9,500 of barbed wire and a $200 attempted bribe, and the trial actually involved wheat flour and lard and evidence that the defendant had bought $40 worth of clothing for the witness. The Second Circuit held that unless courts accept the hypothesis that cautionary instructions are effective, criminal trials in large metropolitan areas may be impossible.

In *United States v. Ogden.* (Penn. D. 1900) 105 Fed. 371, cited on page 34 of the Opening Brief, the trial court granted a new trial on a verdict of guilty, when some of the jurors admitted reading an article which appeared during the trial because the jurors could not be permitted to say it influenced them because they cannot impeach their own verdict. Again, it is submitted that there was nothing to indicate the jurors read or heard any accounts of the trial during the trail.

In *Briggs v. United States,* (6th Cir., 1955) 221 F.2d 636, cited at page 34 of the Opening Brief, the Sixth Circuit reversed, because, although the instructions were not included in the record, the Government made no claim there was a cautionary instruction not to be influenced by anything other than the evidence.

On January 14, 1963, before the trial jurors were selected, the Court cautioned the twenty jurors and the other jurors at the noon recess (TR P 45 L 6 to P 46 L 4), not to read newspapers, don't listen to any radio or watch any television and don't discuss the case. Before the first afternoon recess on the first day, January 14, 1963, after the twelve jurors were

selected (TR P 47) and the two alternates (TR P 64), the Court gave a clear and cautionary instruction not to discuss the case, not to read newspaper articles, or listen to radio or television, to keep themselves segregated, not to socialize with anybody other than jurors, so that they do not inadvertently speak to a witness or any interested party. (TR P 65 L 20 to P 68 L12). He even cautioned them to bear this in mind throughout the trial whether he referred to these things again or not (TR P 68 L 10-12). And he did throughout the trial. On February 6, 1963, when the trial recessed and there were only three surrebuttal witnesses left for the next day, the Court cautioned them not to make up their minds until all the evidence was in and had had the benefit of argument and had received the Court's instruction as to the law as well as stating not to read articles, etc. (TR P 2521 L 25 to P 2522 L 13).

In *Irvin v. Dowd*, (1961) 366 U.S. 717, the Supreme Court reversed the Indiana Supreme Court which refused to reverse a conviction on the basis of an Indiana statute providing for only one change of venue. Defendant moved for change of venue and was granted it. In the new court a panel of 430 was called, 268 were excused for cause on fixed opinions, and eight out of twelve who were ultimately picked admitted having fixed opinions on voir dire. The United States Supreme Court ruled the Indiana Supreme Court could have granted a new trial and a change of venue, and stated at page 722:

> "It is not required, however, that the jurors be totally ignorant of the facts and issues involved. In these days of swift widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. To hold that the

> mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court. *Spies v. Illinois,* 123 U. S. 131; *Holt v. United States,* 218 U.S. 245; *Reynolds v. United States,* supra."

But here none of the jurors expressed any opinion on voir dire (TR P 3 to P 64).

In *Coppedge v. United States,* (D.C. Cir., 1959) 272 F.2d 504, the conviction was reversed because the Court had not admonished the jurors not to read the newspaper or listen to broadcasts. The Court recessed on Thursday and reconvened on Monday. Various prejudicial matters were published in the papers. The defense attorney produced the articles on Monday and asked for a mistrial. *Counsel then asked the Court to inquire of the jurors if they had read the articles. Some had.* Court instructed that articles must not affect decision and asked, Was there anyone who would be? None raised his hand. The Court repeated the question. The Circuit Court held the trial court should have admonished the jurors on the first recess, nor did the Court warn the jurors who had read the articles not to reveal the contents. By the nature of the articles there was no necessity of showing he was injured. (Articles carried the account of a witness who refused to answer when first called and was afraid to testify because the defendant was serving time for assaulting the witnesses's brother. The Court held the witness in contempt and suspended the sentence. The defendant did not take the stand.)

In *Holmes v. United States,* (4th Cir., 1960) 284 F.2d 716, cited at page 36 of the Opening Brief, the conviction was

reversed because even after careful instructions one of the jurors communicated with a Deputy United States Marshal. (The juror's version was that he said, "I wonder where the defendants are staying?" and the Deputy Marshal replied that he didn't know where Holmes was staying but Bedani was serving a six year prison sentence. The Deputy Marshal's version was, he don't know about Holmes, but he took Bedani back and forth to Lexington County Jail, and that the juror learned of the conviction from a newspaper article). The Fourth Circuit reversed the conviction for the improper communication between a court official and a juror. *Holmes v. United States,* supra, at p. 719.

In *New York v. Bloeth*, (2nd Cir., 1963), 313 F.2d 364, cited on page 36 of the Opening Brief, the Second Circuit reversed a state conviction since the standards of impartiality as set forth in *Irvin v. Dodd,* supra, were not met. The Court held that too many of the panel had opinions, and that there was not a sufficient voir dire of those who did have opinions to see if they could be set aside. (Of 16 jurors seated, only one had not read of the case—eight had no opinion, eight did have an opinion as to guilt but could be changed. Of jurors called other than the sixteen, forty-two were excused who had fixed opinions, thirty-four had opinion as to guilt, five had no opinions and two had not read of the case.)

As was stated before, of the twenty-eight jurors called, none had an opinion. If Defendant Semlar claims that the nine jurors, who had stated they had read something of the matter and had no recollection other than there was a charge and had no opinion, were prejudiced then it is respectfully submitted there should have been a challenge for cause as was done in *Crawford v. United States,* supra, wherein a juror stated he was an employee of the Government, but this fact

would not influence his opinion and the defense attorney did challenge for cause and was overruled by the trial court.

Defendant Semler next argues the mass trial was unconstitutional and cites *Kotteakos v. United States,* (1946) 328 U.S. 750 at page 37 of the Opening Brief in support of this. In that case thirty-two were indicted, nineteen of which were brought to trial, thirteen of which were submitted to the jury. In that trial eight separate conspiracies were shown, but the Indictment charged only one. In the quote given on page 37, no page is given for the quotation, but it is respectfully submitted that the first part is a sentence taken from the middle of a paragraph on the top of page 774, and the last half is a portion of a sentence from the last paragraph on the bottom of page 775. The full sentence on page 775 reads:

> "That right, in each instance, was the right not to be tried *en masse* for the conglomeration of distinct and separate offenses committed by others as shown by this record."

Defendant Semler then makes the bare assertion that there was no connection between the eleven episodes and Defendant Semler, and ignores the transcript of the testimony, "as shown by this record" completely.

The testimony of Sergeant Wooldridge is ignored, to cite a few illustrations:

> "A. We loaded the units in the truck, he had a GMC truck and we took them to the parking lot at the Sands Motel and just parked the truck in where the bed was back to us. We went over across the street to the Desert Inn Motel and sat down at a bar, and this is the first time that I actually knew Mr. Semler's name or what he actually looked like. And while we were sitting in the

bar I never did see Mr. Semler drive up, but I could see him unloading the units from the truck and putting them in the car.

"Q. Could you see his face?

"A. I couldn't see his face close enough to say, well, this is, you know.

"Q. Well, how did you know—

"A. His features—

"Q. You said it's Mr. Semler, how did you know that?

"A. Well, Dixie told me that this—this is when he told me that this is who he sells the radios to, this is the boss man or what have you."
(TR P 1455 L 21 through P 1456 L 13),

and then on P 1485 L 19 to P 1486 L 9, where Sergeant Howell had to have five minutes to explain to Defendant Semler that Sergeant Wooldridge was "okay" and "it would be all right" to meet him.

And the testimony of Sergeant Howell, to give a few illustrations of the conversation in the Sands Motel room in June of 1961 of Defendant Semler where the Defendant Semler orders radios (TR P 1263 L 2-12), of the Defendant Semler sending him a booklet with items checked in it (TR P 1274 L 3-11), of ordering specific radios which had been placed for bid on the market (the ARC-33) giving Sergeant Howell the specific location (TR P 1274 L 15 to P 1275 L 8), of asking Sergeant Howell to use a code, suitcases, (TR P 1272 L 25 to P 1273 L 18), of not to call him, Defendant Semler, at home any more (TR P 1281 L 1-5), and so on.

All this evidence is ignored by Defendant Semler and the bare assertion is again made of his lack of knowledge of the thefts.

The evidence was either direct or circumstantial, but it is submitted that the rule on appeal is to review the evidence in the light most favorable to the prevailing party. (*Souza v. United States,* supra; *Bolen v. United States,* supra)

Next, Defendant Semler alleges in the Opening Brief at page 38, the Court should not have given the instruction when the first evidence was submitted on the conspiracy count, Count I. Since no citation to the record is given in the Opening Brief, it will have to be assumed that Defendant Semler has reference to pages 133 to 137 of the transcript of the testimony, wherein the Court instructs the jury as to how the evidence will be considered. No objection was taken to this (see page 137 and thereafter of TR). It cannot be raised for the first time on appeal. (*United States v. Socony-Vaccuum Oil Co.,* (1940) 310 U.S. 150 at pages 238-239, which rules on no objections on the arguments of counsel, but is the rule generally on any claimed error not objected to.)

The instructions were circulated to the Government and defense counsel (TR P 2528 L 2-3). When they were is not shown by the record, but it appears from the Opening Brief that Defendant Semler is now claiming his counsel did not have sufficient time to review the Court's instruction (Opening Brief, page 38) to object effectively, or else Defendant Semler is arguing there was no settlement of instruction and ignores the record of what occurred the afternoon of February 6, 1963, in Chambers when, first the usual motions were asked for by the Court at that time with only three witnesses left

and no objection was made by counsel (TR P 2523 L 1-16), and then the usual motions were made (TR P 2523 L 17 to P 2526 L 7). Then the forms of verdicts were settled (TR P 2526 L 8 to P 2527 L 1). Then the Court took up first the Court's instructions and permitted objections and exceptions for the record (TR P 2527 L 2 to P 2531 L 7); then the Government's proposed instructions were taken up (TR P 2531 L 7-22); then each defendant's proposed instructions (TR P 2531 L 23 to P 2546 L 6). It is respectfully submitted that the practice in the Tucson Division of the United States District Court for the District of Arizona is to make the record of objections and exceptions as was done in this case in Chambers and not after the charge.

The objection to the conspiracy instruction (Court's One, RC Item 16), as stated by Defendant Semler's counsel, was to incorporate Defendant Munoz's objection to the conspiracy instruction (TR P 2527 L 25 to P 2528 L 1), which was that in instructing as to the law of conspiracy on overt acts Defendant Munoz's counsel contended that in stating that the act could be as innocent as a man walking across the street or driving an automobile or using a telephone constituted a comment on the evidence by the Court (TR P 2527 L 11-22). See *Marino v. United States,* (9th Cir., 1937) 91 F.2d 691 at p. 695, and the cases cited in footnote 11.

It is therefore respectfully submitted that the motion to sever was waived and that Defendant Semler was accorded a fair trial by an impartial jury and that there was not a mass trial in violation of defendant's constitutional rights and there was no error in the Court's instructions.

4. A MERE STATEMENT THAT THE COURT ERRED IN FAILING TO GRANT DEFENDANT SEM-

LER'S MOTION TO DISMISS THE INDICTMENT AND MOTION TO STRIKE DOES NOT RAISE THE ISSUE WITH NOTHING MORE ON THE RECORD, OR IN THE OPENING BRIEF.

These two motions were denied on December 10, 1962 (RC Item 10). They were not raised in Chambers just prior to the commencement of the trial (RC Item 13), they were not raised at the close of the Government's case (TR P 1624 L 21 to P 1634 L 20), except the statement on Lines 19-20, Page 1634 ("and in the alternative grant to Motion to Strike that we made."), which it is respectfully submitted may have had reference to the motion to strike Sergeant Howell's testimony (TR P 1413 L 19-25). The motions were not raised at the end of the evidence (TR P 2523 L 17-24) except the motion to strike, which it is submitted, was a reference to strike Howell's testimony (TR P 1413 L 19-25).

Should the Court contend the two issues have been raised, it is submitted that the Motion to Dismiss and the Motion to Strike were properly denied. *Williams v. United States,* (5th Cir., 1954) 208 F.2d 447, certiorari denied, 347 U.S. 928, 98 L.Ed. 1081, 74 S.Ct. 531, upholds a similar indictment, (see also *Frohwerk v. United States,* (1919) 249 U.S. 204 at p. 209; also *Braverman v. United States,* (1942) 317 U.S. 49, at p. 54), and the basis for the Motion to Strike "including" as surplusage and the overt acts as surplusage is still not clear now, as it was not clear when the motion to strike was made. The Court has wide discretion in determining what is subject to a motion to strike. (*United States v. Courtney,* (2nd Cir., 1958), 257 F.2d 944).

It is respectfully submitted that Defendant Semler has

not properly raised the Motion to Dismiss the Indictment or the Motion to Strike and further, that the Motions were properly denied.

VI.

CONCLUSION

There was sufficient evidence to sustain a conviction of Defendant Semler on the conspiracy count, Count I, and the substantive counts, Counts V, VII and X. The Court properly sustained the invoking of the privilege of the Fifth Amendment by Edsel Dekalb Howell on the question submitted on cross-examination which could incriminate him and which was on a subject not gone into on direct testimony and was not material or relevant to the issues in that a prior bad act of a witness, not a party, cannot be used to impeach the witness. The Appellant, Defendant Semler, was afforded a fair trial by an impartial jury. The Motion to Dismiss the Indictment and Motion to Strike have not been raised properly, and, if they were, were properly denied.

Respectfully submitted,

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Attorneys for Appellee

I certify that, in connection with the preparation of this Brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing Brief is in full compliance with those rules.

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Three copies of within Brief of Appellee mailed this 30 day of November, 1963, to:

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No. 18705

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

NORMAN NATHAN SEMLER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal From the United States District Court for the District of Arizona.

APPELLANT'S CLOSING BRIEF.

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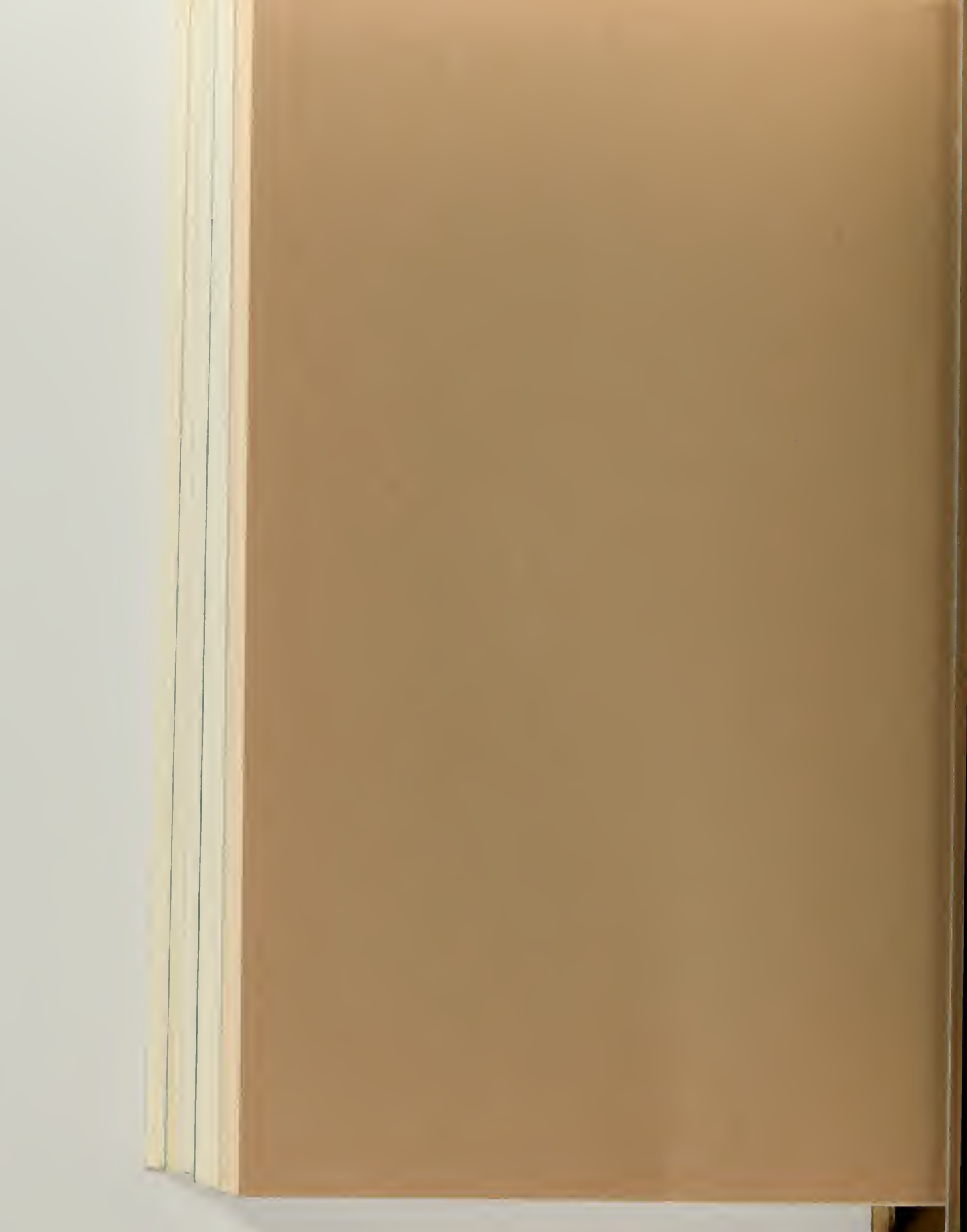

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

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APPELLANT'S CLOSING BRIEF.

POINT I.

The Evidence Was Not Sufficient to Sustain a Conviction of Appellant Semler on Counts I, V, VII and X.

The Government's brief argues that the evidence was sufficient to sustain a conviction of appellant Semler. They cite a counter-statement of facts in the Reply Brief from pages 5 through 13, in which they set forth eleven so-called "episodes." A careful examination of the Government's counter-statement of facts and a review of the "episodes" indicates that appellant Semler is not involved in 8 of the 11 "episodes". The counter-statement of facts show that Sgt. Howell and Sgt. Wooldridge organized a group of airmen and civilians working at Davis-Monthan Air Force Base in 1961 and

the early part of 1962 to steal surplus material belonging to the Government. There is no question that this gang stole from the Government and that the leaders were Sgt. Howell and Sgt. Wooldridge. There is also no question that there were three sales by Howell of some of the stolen property to Semler Industries, Inc. The sales were on March 22, 1962, March 27, 1962 and May 26, 1962, and are set forth in Counts V, VII and X in the Indictment.

The testimony is clear that the thefts were completed by the Howell-Wooldridge group at the Air Force Base and the only involvement of appellant Semler is that he was called on the telephone by Howell and offered the purchase of this material. This was after Howell called another surplus dealer and did not find him in his place of business.

There is no evidence in the 2,600-page record indicating that appellant Semler was part of the conspiracy to steal, even if the case is construed in the most favorable light to the Government. There have been only insinuations, suspicions and innuendoes raised that appellant Semler was a co-conspirator.

This is consistent with the entire manner in which the trial was conducted by the Government. They were not content to indict and convict Sgt. Howell, Sgt. Wooldridge and the other participants in the theft of surplus airplane parts from the Air Force Base. They brought in one of the innocent purchasers of some of the stolen property in the person of appellant Semler. They cite *Souza v. U.S.,* (9th Cir. 1962), 304 F.2d 274 at p. 277, and *Bolen v. U.S.,* (9th Cir. 1962), 303 F.2d 870 at p. 874, in support of their claim that the evidence against appellant Semler is sufficient to support a conviction. (Government Reply Brief p. 15).

In the *Bolen* case, *supra,* the appellants were indicted and convicted of using the mails to defraud. They sent sight drafts against bills of lading through the mails without delivering boats ordered by customers, and they obtained funds from the bank by means of false representations or promises. The Court properly held that this was sufficient to show the required criminal intent, even though the defendants intended to repay the bank or make delivery of the boats later. *LeMore v. United States,* (5th Cir. 1918), 253 Fed. 887.

In the *Souza* case, *supra,* the defendant confessed that he stole lead pipe belonging to the Government and sold it to a junk man. The junk man was not indicted. Souza was indicted and convicted. The question arose in that case whether there was a criminal intent on the part of Souza, that is, with knowledge that the property belonged to and was stolen from the United States Government. In the case of *Morissette v. United States,* 342 U.S. 246 (1952), the Supreme Court stated at page 263:

> "We hold that mere omission from Section 641 of and mention of intent will not be construed as eliminating that element from the crimes denounced."

Adopting the above, this Court, in *Souza v. United States, supra,* stated at page 276:

> "While it is to be noted that in Morissette, the Supreme Court considered only that part of Section 641 which makes it an offense to embezzle, steal, purloin or knowingly convert to his own use or the use of another, of property of the United States, and not that part of the section under which appellant was charged which makes it an offense to sell, without authority, property of the

United States, we believe that the reasoning of the Supreme Court in Morissette compels the conclusion that criminal intent is an essential element of the offenses. . . ."

In the *Souza* case this Court stated at page 277:

"Not only was the jury instructed that the prosecution was required to prove beyond a reasonable doubt that the property described in Counts II, III and IV was the property of the United States, that the same was sold or conveyed by appellant without authority, *and that each sale or conveyance was made by appellant with knowledge on his part* of ownership of the property by the United States, *but also with knowledge that the property had been stolen from the United States.*" (Emphasis added.)

In this case, the Government did not prove that there was an agreement or a confederation of appellant Semler with the conspirators to steal Government property. Semler was an innocent purchaser for value on the three occasions he made purchases from Howell on March 22, 1962, March 27, 1962 and May 26, 1962. He paid for the material in the manner requested by Howell, in cash, after drawing checks for the purchase price. Purchase orders were made out and shipments were made in the name of the company and everything was done by appellant Semler to complete the purchases in the ordinary course of business, using real names without indicating any of the indicia of agreement or confederation with the conspirators to commit one or more of the unlawful acts.

In *Braverman v. U.S.*, 317 U.S. 49 at 53, the Supreme Court stated:

"The gist of the crime of conspiracy as defined by the statute is the agreement or confederation

of the conspirators to commit one or more unlawful acts 'where one or more of such parties do any act to effect the object of the conspiracy.' The overt act, without proof of which a charge of conspiracy cannot be submitted to the jury, may be that of only a single one of the conspirators and need not be itself a crime." Citing *Bannon v. U.S.,* 156 U.S. 464, 468-9; *Joplin Mercantile Co. v. U.S.,* 236 U.S. 531, 535-6; *U.S. vs. Rabinowich,* 238 U.S. 78, 86; *Pierce v. U.S.,* 252 U.S. 239, 244.

"For when a single agreement to commit one or more substantive crimes is evidenced by an overt act, as the statute requires, the precise nature and extent of the conspiracy must be determined by reference to the agreement which embraces and defines its objects. Whether the object of a single agreement is to commit one or many crimes, *it is in either case that agreement which constitutes the conspiracy which the statute punishes.*" (Emphasis added.)

In the case of *United States v. Nardiello,* (3d Cir. 1962), 303 F.2d 876 at 879, the Court stated:

"The evidence must be of such a kind or quality as to permit a jury to find beyond a reasonable doubt that the landlord, Nardiello, knew of and contributed to the conspiracy. See *United States v. Dellaro,* 99 F.2d 781 (2 Cir.1938). We conclude that the above facts do not meet this standard. Obviously, the enumerated circumstances give rise to considerable suspicion, but suspicion is inadequate. The deficiency in the government's case lies in the failure to prove knowledge on the part of Nardiello that his acts 'innocent in themselves' were aiding the conspiracy. United States v. Rappaport, 292 F.2d 261, 264 (3 Cir.), cert.denied, 368 U.S. 827, 82 S.Ct. 48, 7 L.ed. 2d 31 (1961).

> "The record is barren of any association by Nardiello with any of the alleged conspirators, other than Memoli and Pinto, the two tenants of the property. Compare United States v. Monticello, 264 F.2d 47, 49 (3 Cir. 1959)."

In the case of *Marino v. U.S.,* (9th Cir. 1937), 91 F.2d 691 at 695, this Court stated:

> "On the other hand, an accused must join in the agreement to be guilty of a violation of the statute for even if he commits an overt act, he does not violate the statute unless he joined in the agreement."
>
> *United States v. Hirsch,* 100 U.S. 33, 34;
> *Stack v. U.S.,* (9th Cir.) 27 F.2d 16, 17;
> *Weniger v. U.S.,* (9th Cir.) 47 F.2d 602, 603.

Viewed in the light most favorable to the Government, the gist of the evidence adduced against appellant Semler is that he made three purchases of radio-receivers from Howell in March and May, 1962. The Government failed to show that appellant Semler conspired with any other persons named as conspirators (a) to steal Government property, (b) to receive stolen Government property with knowledge that the property was stolen, or (c) that appellant Semler entered into an agreement to accomplish an illegal act. There was no substantial evidence that appellant Semler joined in the agreement and, therefore, he cannot be guilty of a violation of the conspiracy statute because an accused must join in the agreement to be guilty of conspiracy.

Bannon v. U.S., 156 U.S. 464, 468;
Joplin Mercantile Co. v. U.S., 236 U.S. 531, 535;
Terry v. U.S., (9th Cir.) 8 F.2d 28, 29;
Weniger v. U.S., (9th Cir.) 47 F.2d 692;
Heskett v. U.S., (9th Cir.), 58 F.2d 897, 902;
Craig v. U.S., (9th Cir.) 81 F.2d 816, 822.

The Courts have held that even if he commits an overt act, he does not violate the conspiracy statute unless he joined in the agreement. Knowledge of membership in the conspiracy, the part played by each of the members, and the division of the spoils is immaterial. He must know the purpose of the conspiracy, otherwise he is not guilty.

United States v. Hirsch, 100 U.S. 33, 34;
Stack v. U.S., (9th Cir.) 27 F.2d 16, 17;
Coates v. U.S., (9th Cir.) 59 F.2d 173, 174.

The law is clear that a conspiracy is bottomed on an agreement to accomplish an illegal act, and without such agreement, which must be proved, there can be no conspiracy for a conspiracy "is a partnership in criminal purposes."

Mercante v. U.S., (10th Cir.) 49 F.2d 156, 157;
Johnson v. U.S., (9th Cir.) 62 F.2d 32, 34.

Examination of Sgt. Howell's testimony with his rambling, disconnected, uncertain, and improbable statements, just as he gave them, will convince the Court that his testimony against appellant Semler does not measure up to that standard of substantial evidence which can be the basis of a conviction by the jury. To sustain the conviction of appellant Semler there must be in the record substantial evidence of his agreement to join a conspiracy to rob the Air Force Base of material, and participation in the agreement to accomplish the illegal act. No such evidence is in the record. The Government's case proves a theft by civilians and airmen led by Sgt. Howell and Sgt. Wooldridge without the knowledge, agreement, participation or activity by appellant Semler to accomplish these thefts.

The Government's attempts to make out a case against appellant Semler by circumstantial evidence is of the flimsiest calibre. The question as to the suffi-

ciency of either direct or circumstantial evidence is whether it is substantial, taking the view most favorable to the Government.

Glasser v. U.S., 315 U.S. 60;
Rossetti v. U.S., (9th Cir.1963) 315 F.2d 86;
Miller v. U.S., (9th Cir. 1962), 302 F.2d 659;
Bowler v. U.S., (9th Cir.1957), 249 F.2d 806;
Elwert v. U.S., (9th Cir.1956), 231 F.2d 928;
Sachs v. U.S., (9th Cir.1960), 281 F.2d 189.

Remmer v. U.S., (9th Cir.1953), 205 F.2d 277, holds that the proper test of whether the evidence is sufficient to sustain a verdict of guilty is:

". . . could reasonable minds say that the evidence excludes every reasonable hypothesis but that of guilt. . . ." (at p. 288).

In *Enriquez v. U.S.,* Docket No. 17928, March 4, 1963 (9th Cir.) ..... F.2d ....., this Court stated:

"Whenever we add to the untrustworthiness of the testimony of the principal witness against the appealing defendant, the proof introduced as to intent plus the other testimony under a theory of conspiracy to be proved, we reach the firm and final belief that the appealing defendants did not have a proper trial, because inadmissible evidence on the issue of intent was permitted to be introduced which may have inflamed and influenced the jury in a weak case such as this."

In *Farrell v. U.S.,* (9th Cir. Docket No. 18241, Aug. 7, 1963) .....F.2d....., at page 6, this Court stated:

"The decisions reveal two tests which are applied in determining the sufficiency of either direct or circumstantial evidence to support a jury verdict. The verdict of a jury must be sustained if there is substantial evidence when viewed in the

light most favorable to support the judgment. *Glasser v. U.S.,* 315 U.S. 60 (1942); *Williams v. U.S.,* 273 F.2d 781 (9th Cir. 1959) cert.den. 362 U.S. 951; *Robinson v. U.S.,* 262 F.2d 645 (9th Cir. 1959); *Miller v. U.S.,* 302 F.2d 659 (9th Cir. 1962). The verdict of a jury must be sustained if reasonable minds, as triers of the fact, could find that the evidence excludes every reasonable hypothesis but that of guilt."

Remmer v. U.S., 205 F.2d 277 (9th Cir. 1953).

See also

Bolen v. U.S., 303 F.2d 870 (9th Cir. 1962).

In *Glasser v. U.S.,* 315 U.S. 60 (1941), the Supreme Court stated at page 71:

"Upon the trial judge rests the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused . . . such duty is not to be discharged by rote, but with sound and advised discretion, with an eye to avoid unreasonable or undue departures from that mode of trial or from any of the essential elements thereof, and with a caution increasing in degree as the offenses dealt with increase in gravity. *Patton v. U.S.,* 281 U.S. 276, 312."

In *Glover v. U.S.,* 306 F.2d 594 at p. 595 (10th Cir. 1962), the Court stated:

"The existence of the conspiracy cannot be established against an alleged conspirator by evidence of acts or declarations of his alleged co-conspirators done or made in his absence. While evidence may have been sufficient to cast suspicion upon Glover, that was not enough. *Guilt may not be inferred from mere association.* We conclude that the evidence viewed in the light most favorable to the Government, was not sufficient to support a ver-

dict of guilty on Counts I, V and VI." (Emphasis added).

Thomas v. U.S., (10th Cir.) 239 F. 2d 7, 10;
Corbin v. U.S., (10th Cir.) 253 F.2d 646, 649;
Evans v. U.S., (9th Cir.) 257 F.2d 121, 126, cert. den. 358 U.S. at 866.

It is clear from all the circumstances in this case, the jury could not infer the existence of a conspiracy in which appellant Semler participated. Nor could they find him guilty of three substantive counts because the Government failed to prove knowledge on Semler's part, when he bought the material, that it was stolen property.

POINT II.

The Court Improperly Prevented Cross-Examination of Principal Witness Howell by Permitting Him to Invoke the Privilege of the Fifth Amendment Relating to Other Sales of Stolen Government Property Within the Period of the Indictment Inasmuch as This Was Within the Scope of the Direct Examination and Was a Proper Impeachment Question.

We covered this point fully in the Opening Brief, pages 25, 26, 27 and 28. The question on cross-examination by appellant Semler's counsel requesting Howell to disclose whether, during this period, he sold merchandise to persons other than appellant Semler was very material and a proper impeaching question. Rereading the cross-examination by Mr. Chandler of Howell, (Note 6 in Opening Brief on pages 11 and 12), clearly indicates that it was serious error to have excluded the answer to this question. It would have shown, perhaps, that Howell and his associates sold other stolen material to other surplus electronic dealers throughout the country.

In the case of *Alford v. U.S.*, (1930) 282 U.S. 686 at 691 and 692, the Supreme Court stated the following:

> "Cross-examination of a witness is a matter of right. . . . Counsel often cannot know in advance what pertinent facts may be elicited on cross-examination. For that reason it is necessarily exploratory; and the rule that the examiner must indicate the purpose of his inquiry does not, in general, apply. It is the essence of a fair trial that reasonable latitude be given the cross-examiner, even though he is unable to state to the court what facts a reasonable cross-examination might develop.
>
> "Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them. To say that prejudice can be established only by showing that the cross-examination, if pursued, would necessarily have brought out facts tending to discredit the testimony in chief, is to deny a substantial right and withdraw one of the safeguards essential to a fair trial. In this respect a summary denial of the right of cross-examination is distinguishable from the erroneous admission of harmless testimony."

POINT III.

The Court Erred in Failing to Provide Appellant Semler With a Fair Trial and an Impartial Jury.

We have stated at great length on pages 17 through 20 of the Opening Brief the facts relating to the unfair trial received by appellant Semler. On pages 28 through 38 we set forth the argument and reasons why the trial was not fair and the jury was not impartial in this case. On page 33 of the Government's Reply Brief they raise the question that we discussed a news-

paper article dated July 3,1962, which was not transcribed in the Appendix of the Opening Brief. We did not put this article in the Opening Brief because it was the first article in the case and did not mention appellant Semler. However, since it was the beginning of the barrage of newspaper publicity, we now set it forth in the Appendix together with the photograph which appeared in connection with the damaging newspaper article.

POINT IV.

The Motion to Dismiss the Indictment and the Motion to Strike Appears in the Transcript of the Record and Is Properly Raised in This Appeal.

The transcript of the record, Vol. I, is part of the file in this appeal. The motion to dismiss the Indictment and the motion to strike appear in the transcript of the record and set forth the reasons why these motions should have been granted by the Court below. It raises the issue on the record and is properly before this Court. There is a memorandum in support of the motion to dismiss, together with an affidavit and the motion to dismiss. Similarly, the motion to strike and the memorandum in support thereof is set forth in the transcript of the record and is fully before this Court on this appeal.

Conclusion.

For the reasons stated in the opening brief and further developed herein, it is clear that the conviction must be reversed.

Dated at Burbank, California,
January 23, 1964.

Respectfully submitted,

ROGAN & RADDING,
DAVID M. RICHMAN,
Attorneys for Appellant.

Certificate.

I certify that, in connection with the preparation of this closing brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing closing brief is in full compliance with those rules.

DAVID M. RICHMAN,
Attorney for Appellant.

WEATHER
Forecast for Tucson: Cloudy, ittle change.
Temperatures
'esterday: HIGH 92 LOW 79
'ear Ago: HIGH 95 LOW 68
U. S. Weather Bureau

ARIZONA DAILY STAR
July 3, 1962

The

'L. 121 NO. 184

Entered as second class matter, Post Office, Tucson, Arizona

Will Face Charges

Four of six local men charged with stealing radios from planes at Davis-Monthan FB are brought handcuffed into the Federal Building. Sgt. John J. Milne, left, hides his ce as A2C Jean Ybanez lowers his head. A3C Delevin L. Williams, Jr., third from left, asps his fatigue hat as A2C Pedro Leyva tries unsuccessfully to hide behind his hat. (Jack eaffer photos by Dick Wisdom)

APPENDIX.

Newspaper Article

THE ARIZONA DAILY STAR—July 3, 1962
(Photo of arrest of six suspects on preceding page)

SIX SUSPECTS ARRESTED IN AFB THEFT CASE

$160,000 In Loot
Estimated Taken

By BOB THOMAS

Government agents yesterday arrested five Air Force men and a civilian worker at Davis-Monthan AFB as suspected members of a ring which has stolen military radio sets worth more than $160,000 from D-M and Luke AFB, near Phoenix.

The thefts at D-M alone were estimated to total in excess of $100,000 and more than $60,000 at Luke.

It is believed to be the largest theft of government property to occur in this area.

Arrested were 1st Lt. Jack Raymond Kirves, 29; S-Sgt. John J. Milne, 29; A2C Jean Ybanez, 22; A2C Pedor Leyva, 21; A3C Delevin Leon Williams, Jr., 19, all members of the 15th Fighter Interceptor Sqdn., and Robert E. Clark, a civilian working as a warehouse foreman for the 2704th Aircraft Storage and Disposition Group.

Clark lives at 8011 E. 17th Place and Milne at 1537 National Blvd. The others live on the base.

The six D-M men were arrested on information given investigators by three airmen who were arrested June 24 after an aborted attempt to steal radio transmitters from Luke AFB.

Arrested in the $65,000 theft were S-Sgt. Louis Giavelli, 30, of D-M, and S-Sgt. Clint R. Woolridge, 31, and A2C Garry D. Rowe, 23, both of the AF gunnery range at Ajo.

Guards at Luke AFB spotted a strange car on the base and stopped it. Three men in the car ran off in the darkness and escaped. In the car were a number of stolen radio sets.

The three suspects were picked up at their homes a few hours later. The next day FBI agents recovered $40,000 worth of radio sets that had been covered with brush and hidden in the desert off the Benson Hwy.

Edward Boyle, FBI agent in charge of Arizona, said yesterday that the investigation is still continuing and that other arrests may occur.

FBI agents are searching for other hidden radio sets and are investigating how the sets were disposed of.

The radios—for both sending and receiving—were described by an FBI agent as "a hot item" and much in demand for both military and civilian aircraft.

They cost the government more than $3,300 for each set.

Boyle said the sets were probably disposed of through both local and interstate outlets. He would not comment on the question of whether they were smuggled out of the country for use by planes of a foreign country.

Both the FBI and the Air Force's Office of Special Investigations (OSI) have been investigating the D-M thefts since the first of this year.

Most of the radio sets have been stolen from surplus planes in the 2704th's storage yard at D-M where planes are "junked" for useable parts or made flyable

again for U.S. military uses or sold to private or foreign customers.

A few sets were apparently stolen directly from D-M planes. The Luke AFB radios were taken from a warehouse.

Investigators hinted that the thefts may have occurred over a two to three-year period and that the over-all value of the missing equipment may reach an estimated $300,000 to $400,000.

"They've been stealing them blind out there (storage yard) for years," one source said.

The six local suspects were held in Pima County jail in lieu of bond last night.

U.S. Commissioner Tom McKay set a $5,000 bond on Lt. Kirves and $2,000 bond on each of the remaining five suspects.

He continued their hearing on the charges—theft of government property—until next Monday at 1:30 p.m.

The men appeared noncommittal but tense at their hearing. Clark's pregnant wife accompanied him to the hearing yesterday in the Federal building.

The three airmen were arrested at their work in the 15th FIS. They appeared at the hearing still wearing their fatigue uniforms.

Clark, Sgt. Milne and Lt. Kirves were in civilian clothes and were arrested near or at their homes.

Almost the entire FBI office in Tucson took part in the almost simultaneous arrests.

No. 18,705

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

NORMAN NATHAN SEMLER,

Appellant,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S PETITION FOR A REHEARING.

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TABLE OF AUTHORITIES CITED

No. 18,705

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

NORMAN NATHAN SEMLER,

Appellant,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S PETITION FOR A REHEARING.

To Circuit Judges Barnes, Merrill and Koelsch, as Constituting the Court on the Original Hearing:

Appellant in the above-entitled case respectfully prays the Court to grant a rehearing.

The principal question in the present posture of the case is whether the trial judge violated Rule 30 of the Federal Rules of Criminal Procedure in giving the jury an instruction on the law of conspiracy at the beginning of the trial and continuing to reinstruct the jury on conspiracy during the trial on nine different occasions, drumming this highly prejudicial procedure into the jury's mind while the government was presenting its evidence. It is the appellant's contention that this constituted a violation of fundamental rights guaranteed to him by the United States Constitution.

Rule 30 clearly states that "* * * the Court shall instruct the jury *after* the arguments are completed." (Emphasis added). This Court has stated in *Herzog v. United States* (1955), 226 F. 2d 561, at page 569:

> *"Rule 30 is clear and unambiguous and its application is not dependent upon the personal whims*

> *of the court. . . . This rule which has the force of law leaves no area in which it may be disregarded.*" (Emphasis added.)

On page 570 of the *Herzog* decision, this Court further added that under Rule 52 (F.R. Cr.P.):

> "This Court may notice plain or prejudicial error although not set forth as a specification of error relied upon as required by Rule 18 subd. 2 of the rules of this court."

There is no conflict between Rule 30 and Rule 52 and those rules do not nullify each other. Where plain errors or defects affect substantial rights they may be noticed on appeal even though they had not been brought to the attention of the trial court, under Rule 52. *Hawkins v. United States,* 358 U. S. 74.

If therefore it can be properly contended that Rule 30 has the force of law and cannot be disregarded, then it can be contended with equal force that the trial judge in this case committed reversible error in disregarding Rule 30 and instructing the jury on the law of conspiracy at the beginning of the trial and continuing his reference to this instruction throughout the trial.

In the second *Herzog* decision, *Herzog v. United States* (1956, 9th Cir.), 235 F. 2d 664 at 666, this Court having granted a rehearing, *en banc,* stated:

> "The Rule (52b) is in the nature of an anchor to the windward. It is a species of safety provision the precise scope of which was left undefined. Its application to any given situation must in the final analysis be left to the good sense and experience of the judges."

What seems to us to be particularly disturbing about the affirmance in this case is that this Court did not apply Rule 30, or even discuss it, in the light of the issue which was raised in the defendant's opening brief (pp. 12-14) and discussed at length in the oral

argument. The Court completely disposed of this issue of first impression in its opinion by stating:

> "However, out of fairness to the defendants the jury could not be permitted to forget that they were concerned with an alleged conspiracy, and that the competence of certain evidence as to certain defendants depended upon a determination that a conspiracy existed. Not only was it entirely proper to instruct the jury periodically in this fashion, it might well have been prejudicial error not to do so."

Ordinarily we would agree with the Court that opinions which do not serve a public purpose should not be published in the law reports, but this violation of Rule 30 by the trial judge is an issue of first impression in our courts. We are entitled to know whether under Rule 30 a trial judge has the right to instruct a jury in a criminal case and reiterate that instruction nine times during the trial of the case before all evidence has properly been presented to the jury. Surely a jury of fair intelligence is presumed to know the ordinary meaning of a criminal conspiracy. It is entitled first to receive the evidence on the alleged conspiracy and then to decide whether a conspiracy is proved after applying the instruction on conspiracy as given to them by the trial court judge at the end of the trial as is required by Rule 30.

In *United States v. Atkinson* (1936), 297 U. S. 157, at 160, the Supreme Court stated:

> "In exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings."

Cited also in *Lash v. United States* (1955, 1st Cir.), 221 F. 2d 237 at 240. *Screws v. United States* (1945), 325 U. S. 91 at 107; and *Terminiello v. Chicago* (1948), 337 U. S. 1.

The question of critical importance in this case is whether the instruction on conspiracy given by the trial judge at the beginning of the trial and prejudicially drummed into the jury's consciousness nine times during the trial seriously affected the fairness, integrity or public reputation of the judicial proceedings. We submit that the affirmance of the present judgment in these circumstances would amount to a discrimination so unjustifiable as to infringe the Due Process clauses of the Fifth and Fourteenth Amendments. The question here is whether, as an original proposition, the premature instruction on conspiracy by the trial judge and his subsequent reiteration in violation of Rule 30 is so glaringly wrong as to call for the exercise of this Court's power under Rule 52(b) to notice "plain error".

In *Forster v. United States* (1956, 9th Cir.), 237 F. 2d 617, at 621, in reversing a conviction, Chief Judge Chambers summed up this Court's position that "the law must govern", as follows:

> "The nature of our system is that the law must govern. In saturating the system with safeguards for the innocent the guilty will ofttimes profit in such a way as to exasperate some of the fairest judges, the best prosecutors and even the general public as it looks at specific cases."

In *United States v. Palermo* (1958, 3rd Cir.), 259 F. 2d 872 at 881, the Court stated:

> "It is well settled that '. . . the question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for

criminal trials in the federal courts.' *Bollenbach v. U.S.* (1946), 326 U.S. 607, 614.

"The rule stated in *Bollenbach* was spelled out as follows in *Wilson v. U.S.* (1958, 9th Cir.), 250 F.2d 312, at pages 324, 325:

> " 'It is a fundamental precept of the administration of justice in the federal courts that the accused must not only be guilty of the offense of which he is charged and convicted, but that he be tried and convicted according to proper legal procedures and standards. In short, it is not enough that the accused be guilty; our system demands that he be found guilty in the right way. . . .
>
> " 'The decisions are plentiful that an appellate court cannot affirm a conviction erroneously secured on one theory, on the speculation that conviction would have followed if the correct theory had been applied. . . .
>
> " 'The accused is entitled in any case to be tried under proper legal criteria. . . .' "

We therefore respectfully suggest, pursuant to the fifth paragraph of Rule 23 of this Court, that it would be eminently appropriate for this case to be heard *en banc,* to the end that this important question of federal criminal law and the right of a trial judge to do what this trial judge did in contravention of Rule 30 may be authoritatively resolved.

Rehearing is not sought in respect of any other questions.

Dated at Burbank, California, April 8, 1964.

Respectfully submitted,

David M. Richman,
Rogan & Radding,
Attorneys for Appellant and Petitioner.

Certificate of Counsel.

I, David M. Richman, one of the attorneys for the Appellant, certify that this petition is presented in good faith, that it is not interposed for delay, and that in my judgment it is well founded.

Dated at Burbank, California, April 8, 1964.

DAVID M. RICHMAN

No. 18709

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

FORREST LAIDLEY and GEORGE P. VYE,

Appellants,

vs.

BARBARA BOGART HEIGHO, MAXWELL STEVENS HEIGHO and SECURITY-FIRST NATIONAL BANK,

Appellees.

On Appeal From the United States District Court for the Southern District of California, Central Division.

BRIEF FOR APPELLANTS.

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TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Cases — Page

Rules

Statutes

Textbook

No. 18709

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

FORREST LAIDLEY and GEORGE P. VYE,

Appellants,

vs.

BARBARA BOGART HEIGHO, MAXWELL STEVENS HEIGHO and SECURITY-FIRST NATIONAL BANK,

Appellees.

On Appeal From the United States District Court for the Southern District of California, Central Division.

BRIEF FOR APPELLANTS.

Jurisdiction.

The amended complaint alleged that both of the appellants (plaintiffs below) were citizens of Illinois and that all of the defendants, including appellees, were citizens of California.[1] And it was alleged that the matter in controversy, exclusive of interest and costs, exceeds $10,000 [R. 1-2].[2] The District Court had jurisdiction

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[1]Appellee Security-First National Bank is a national banking association which is located in the State of California and hence, pursuant to Title 28, U. S. Code, Section 1348, is deemed to be a citizen of California for the purpose of establishing diversity jurisdiction.

[2]"R." refers to the clerk's transcript of record. "Tr." refers to the reporter's transcript.

of the action by virtue of 28 U. S. Code, Section 1332(a)(1).

In the District Court judgment of dismissal as to appellees was entered March 18, 1963, upon the basis of an express determination that there was no just reason for delay and an express direction of judgment pursuant to Rule 54(b), Federal Rules of Civil Procedure [R. 104-105]. Notice of appeal was filed April 9, 1963 [R. 106]. This Court has jurisdiction of the appeal by virtue of 28 U. S. Code, Section 1291.

Statement of the Case.

The amended complaint stated two claims, one against each of the two sets of defendants, alleged to be liable in the alternative. One claim (the Second) was brought against appellees, collectively referred to as the "Heigho Trust defendants," to set aside fraudulent transfers and to collect a debt of $118,900 out of the property so transferred [R. 7-10]. The other claim (the First) was a malpractice claim alternatively asserted against five lawyers (collectively referred to as the "Surr & Hellyer defendants"), members of a firm which formerly represented appellants, on the theory that they negligently suffered appellants' claim against the Heigho Trust defendants to become barred, if in fact it is barred [R. 4-6].

On December 10, 1950, William S. Heigho became indebted to appellants' assignors in the amount of $118,-900 for brokers' commissions due under a written contract of employment. The whole amount remains unpaid [R. 4].

In 1951 William S. Heigho, for the purpose of defrauding appellants' assignors, transferred property including $331,504.23 worth of securities into two trusts held by the predecessor in interest of appellee Security-First National Bank. The transfers left William S. Heigho insolvent. He retained the power of revocation. Appellees Barbara Bogart Heigho and Maxwell Stevens Heigho were beneficiaries of the trusts, which remained unrevoked until the death of William S. Heigho December 9, 1956; since then the trustee, appellee Security-First National Bank, has paid over $200,000 to appellee Barbara Bogart Heigho and it now holds trust assets of more than $175,000 [R. 4-5].

On March 19, 1954, appellants' assignors instituted an action on their claim against William S. Heigho in the Superior Court, San Bernardino County, California, but service of process on him was never effected [R. 5].

William S. Heigho died December 9, 1956. His will was admitted to probate in the Superior Court, Los Angeles County, California, and letters testamentary were issued to appellee Barbara Bogart Heigho [R. 5]. The executrix was never impleaded in the San Bernardino County action; she rejected appellants' probate claim; suit was never brought thereon; after the William S. Heigho probate proceeding was closed a petition to reopen it was denied by the Superior Court, Los Angeles County; and that order was affirmed by the California District Court of Appeal [R. 30-41]. These proceedings will be discussed below in more detail in relation to appellees' defense of *res judicata.*

Appellees moved for dismissal of the amended complaint as against them on the ground of *res judicata* [R. 12-17]. The motion was granted by order entered October 24, 1961 [R. 47-48]. Thereafter, appellants' motion to vacate the order of dismissal was denied and their motion for reconsideration was also denied in circumstances set forth below. Judgment of dismissal was entered March 18, 1963 [R. 104].

The claim against appellees is one to collect a debt out of property fraudulently transferred to them by William S. Heigho when he established the 1951 *inter vivos* trusts. Under the Uniform Fraudulent Conveyance Act, which California has adopted, a creditor need not first obtain judgment against the fraudulent transferor, but may proceed directly against transferees: Section 3439.09, California Code of Civil Procedure. The fraudulent grantor is not a necessary party: *Liuzza v. Bell,* 40 Cal. App. 2d 417, 424, 104 P. 2d 1095.

Appellees' motion to dismiss on the ground of *res judicata* was supported by the affidavit of George R. Larwill, one of appellees' counsel, to which was attached a copy of the opinion of the California District Court of Appeal in *Estate of Heigho,* 186 Cal. App. 2d 360, 9 Cal. Rptr. 196 [R. 26-41]. No copy of any judgment was submitted.

Judge Kunzel granted appellees' motion to dismiss on the ground that although "an action can be brought against a transferee without joining the transferor who made the alleged fraudulent transfer . . . under such circumstances it must appear that the claim of

plaintiffs has been reduced to judgment or is capable of being reduced to judgment" and that

> "plaintiffs' claim against the estate of the alleged debtor and fraudulent transferor is forever barred by the provisions of Section 714 of the California Probate Code for having failed to file suit [on a rejected probate claim] within the time provided." [R. 47].

Appellants' motion to vacate the order of dismissal [R. 49] came before Judge Carr, to whom the case had been reassigned. He commented that "under the law I don't think there is any *res judicata* at all" [Tr. 10] and announced that he was referring the case back to Judge Kunzel to hear the motion at a time to be set by him [Tr. 16]. But Judge Kunzel never heard the motion; instead, Judge Carr took it up again at a time when it was not on the calendar and denied it [Tr. 18-29]; thereafter, he denied a motion for reconsideration and rendered judgment of dismissal [R. 104-105].

It is appellants' position that appellees did not establish a right to dismissal on the ground of *res judicata* or otherwise.

Certain California statutes are, or may be, involved. They are set forth in the Appendix.

Questions Presented.

1. Whether appellees' affirmative defense of *res judicata* was established on the basis of their showing, which did not include an authenticated (or any) copy of any judgment on which they relied.

2. Whether, in certain State court probate proceedings referred to, any judgment or order was made which is *res judicata* as to the issue as between appellants and appellees, namely, whether appellants may proceed against fraudulently-conveyed property in the hands of appellees.

3. Whether there was identity or privity of parties between this action and the State court proceeding so as to permit application of the *res judicata* doctrine.

4. Whether under California law the circumstance that appellants' probate claim against the estate of the deceased debtor-transferor was barred by a probate statute of limitations necessarily constitutes an absolute defense to appellants' action against fraudulently-conveyed property in the hands of appellees, who derived such property in *inter vivos* transactions and not through the debtor's probate estate.

Specification of Errors.

1. The District Court erred in granting appellees' motion to dismiss the complaint as against them.

2. The District Court erred in denying appellants' motion to vacate the order of dismissal.

3. The District Court erred in giving judgment of dismissal.

Summary of Argument.

I.

Appellees had the burden of establishing their affirmative defense of *res judicata*. They failed to do so. They did not submit an authenticated (or any) copy of any judgment to establish such a defense. What they submitted was a copy of a State appellate court opinion, which is not a judgment and of itself is not *res judicata* of anything. Nor was any of the State court proceedings therein referred to *res judicata* of appellants' claim against appellees, for the issues were not the same; also, identity or privity of parties is lacking.

II.

Under California law creditors have the right to proceed against property in the hands of fraudulent transferees, at least in some circumstances, although their remedy against the debtor-transferor is barred by limitations. Accordingly, appellees failed to establish an absolute defense on the ground that appellants' claim against the debtor-transferor's probate estate was barred by a probate statute of limitations. The action against appellees should therefore be tried; dismissal on motion was unauthorized.

ARGUMENT.

I.

The Action Against Appellees Was Not Subject to Dismissal on the Ground of Res Judicata, for There Was Lacking Identity of Issues and Identity or Privity of Parties.

Rule 8(c), Federal Rules of Civil Procedure, mentions *res judicata* as one of the affirmative defenses to be pleaded in the answer. The defense may also be asserted by motion. But however asserted, the defense is still an affirmative one which the defendant has the burden of establishing by evidence. Accordingly, a motion to dismiss on the ground of *res judicata,* if not directed to the face of the complaint, must be a "speaking" motion in the nature of a motion for summary judgment.

A party relying on *res judicata* must produce evidence of the former adjudication, which in some cases must be supplemented by evidence dehors the record to establish the scope of the prior adjudication.

Smith v. Heilman, 171 Cal. App. 2d 424, 430, 340 P. 2d 752;

Crain v. Crain, 187 Cal. App. 2d 825, 9 Cal. Rptr. 850.

Res judicata must be proved by a certified copy of the judgment relied on or other competent evidence.

Domestic & Foreign Petroleum Corp. v. Long, 4 Cal. 2d 547, 51 P. 2d 73;

Johnson v. Ota, 43 Cal. App. 2d 103, 110 P. 2d 507.

The usual way of proving a judgment is to produce a certified copy.

Section 1905, California Code of Civil Procedure.

Appellees did not submit an authenticated (or any) copy of the judgment on which they relied. Our objection here is not merely technical. It is necessary to show precisely what was adjudged and as to whom. If appellees had produced a copy of the judgment relied on the confusion which prevailed in the proceedings below might well have been avoided. But instead, they submitted a copy of a State appellate court opinion which discusses a variety of topics and much of which appears to be dictum. But an opinion is not *res judicata*:

Ball v. Rodgers, 187 Cal. App. 2d 442, 9 Cal. Rptr. 666;

Del Riccio v. Photochart, 124 Cal. App. 2d 301, 268 P. 2d 814.

For all that was said in the discursive and rather argumentative opinion of the State appellate court, its judgment merely affirmed a lower court order denying an application for reopening of the Heigho estate and for letters of administration. The order of the lower court therefore became final. If there were any *res judicata* it would have to be founded on that order. But that order was not before the District Court in this case. Reversal of the judgment of dismissal on that ground alone would be justified.

The State appellate court opinion refers to some of the lower State court proceedings upon which appellees seemingly rely. We turn to them.

First: It is shown that in the probate proceeding on Heigho's estate appellants presented a creditor's claim to the executrix, who was Heigho's widow and

one of the beneficiaries of the trust which Heigho established in fraud of creditors. She rejected the claim. The act of a decedent's personal representative in rejecting a creditor's claim is not a judgment or order: *Estate of Middleton,* 215 A. C. A. 367, 30 Cal. Rptr. 155. *Res judicata* cannot be predicated on rejection of the claim.

Second: Appellants did not sue on the rejected claim within the time prescribed by Section 714, California Probate Code. The result was that appellants evidently lost the right to payment of their claim out of Heigho's probate estate.[3] If so, that was not because of any judgment or order, but because the probate statute of limitations had run after the executrix rejected appellants' creditor's claim. *Res judicata* is not involved. Appellees contend that appellants' action against them as transferees must fail because appellants' claim against Heigho's probate estate is barred by limitations. We shall discuss that contention below under Point II.

Third: The executrix' final account in the Heigho estate proceeding was approved. According to the State appellate court opinion "among the recitals in the account was one concerning the filing and rejection of the Laidley-Vye claim and the further recital that no suit based thereon had been instituted within the statutory period of three months (Prob. Code, § 714)." There is nothing else in this record to show what was in the final account, except that it may be inferred that the executrix therein accounted only for the property men-

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[3]The estate would have been insufficient to pay appellants' claim in full in any event; appellants would have had to proceed against fraudulently-transferred property as they do now.

tioned in the probate inventory, which did not include the fraudulently-conveyed trust property now in question. Under California law, an order settling and approving an account is final as to the matters covered thereby; it is not final as to property which the personal representative wrongfully omitted to inventory: *Pickens v. Merriam* (C. C. A. 9), 242 Fed. 363.

We have never denied that the executrix rejected appellants' creditor's claim or that appellants failed to sue on the rejected claim within the time limited by Section 714, California Probate Code. If the order approving the final account is believed to be *res judicata* as to those facts, it is no matter; those facts were already conceded. But neither the final account nor the order approving it decided the question involved in this action, namely, whether appellants may proceed against fraudulently-conveyed property in the hands of appellees; as to that question there is no *res judicata.* We discuss that question below under Point II.

Fourth: In the probate proceeding there was an order of final distribution. Under California law such an order is conclusive only as to the rights of heirs, devisees, and legatees, none of which classes includes appellants: Section 1021, California Probate Code. There is no *res judicata* as to them.

The order of final distribution included an "omnibus" clause which purported to distribute "all other property of said estate whether described therein or not". Since the order was not conclusive against appellants the inclusion of the "omnibus" clause is without present significance. We point out, however, that the "omnibus" clause did not purport to adjudge any-

thing relevant to the instant action, nor could it have done so. The purpose of such a clause is to adjudge, as among the heirs, devisees, and legatees, their respective rights to property under the control of the probate court. But the trust property now in question was conveyed to appellees in 1951; they held it, and still hold it, under color of title acquired independently of Heigho's probate estate. The probate court lacked jurisdiction to decide any question of title as between the estate and anyone else (other than the personal representative) claiming property adversely to it under another title: *King v. Wilson,* 96 Cal. App. 2d 212, 215 P. 2d 50. Accordingly, the rights of appellees Security-First National Bank and Maxwell Stevens Heigho to the trust property could not have been adjudged by the probate court. The probate court would have had jurisdiction to try title as between the estate and the executrix personally if any such issue had been presented, but none was, and nothing of the sort was decided.

Fifth: The probate court denied an application to reopen the Heigho estate proceeding and appoint an administrator. That order was affirmed on appeal, as mentioned above. The application to reopen the estate was made by Robert J. Bierschbach (one of the Surr & Hellyer defendants), who wished to be appointed administrator so as to prosecute an action under Section 579, California Probate Code. The question now is whether the probate court's refusal to reopen the estate and appoint an administrator is *res judicata* as to rights which appellants assert in the instant action.

Section 579, California Probate Code, permits a decedent's personal representative to bring an action to recover property fraudulently conveyed by the decedent. This is not an exclusive procedure, but is cumulative to the right of persons asserting claims against a decedent to proceed directly against fraudulent transferees, without even joining the decedent's personal representative as a party: *Liuzza v. Bell,* 40 Cal. App. 2d 417, 424, 104 P. 2d 1095. And an action, either by the decedent's personal representative or by others, to avoid fraudulent conveyances must be brought in a court of general jurisdiction; the probate court does not have jurisdiction to entertain such an action.

Section 1067, California Probate Code, provides that the final settlement of an estate shall not prevent a subsequent issue of letters if other property of the estate is discovered or if it becomes necessary or proper for any cause that letters should be again issued.

The result of the foregoing is: when the probate court had before it the application to reopen Heigho's estate, all it had to decide and all it could decide was whether to issue new letters of administration. If new letters had issued the administrator could have brought an action in another court to set aside fraudulent conveyances under Section 579, Probate Code. But as we have seen, that was not an exclusive remedy. By refusing to issue new letters the probate court could not prevent creditors from bringing an independent action to set aside fraudulent conveyances. Nor, in view of its limited jurisdiction, could the probate court determine the merits of such an action if brought. What it comes down to is this: When new letters were

applied for the probate court had only two alternatives, viz.: (1) to appoint an administrator and thereby make available the cumulative remedy provided by Section 579, California Probate Code; or (2) to refuse such appointment and thereby remit creditors to their independent action in another court. The probate court chose the latter alternative. New letters were not issued; no action was brought under Section 579, California Probate Code; and appellants have brought an independent action in another court. The probate court did not adjudicate appellants' cause of action against appellees and it had no jurisdiction to do so. Accordingly, the refusal of the probate court to reopen Heigho's estate is not *res judicata* as to this action.

None of the State court proceedings reviewed above decided the question involved in the instant action, namely, whether appellants may proceed against fraudulently-conveyed property in the hands of appellees. Accordingly, there is no *res judicata* for want of identity of issues. There is also a lack of the identity or privity of parties which is necessary for the operation of *res judicata.*

None of the appellees was a party to any of the State court proceedings in question. In her capacity as executrix appellee Barbara Bogart Heigho was a party, but for *res judicata* purposes there is no identity of parties where a person has appeared in a representative capacity in one action and individually (as here)

in another: *Clark v. Lesher,* 46 Cal. 2d 874, 299 P. 2d 865; *Finnerty v. Cummings,* 132 Cal. App. 48, 22 P. 2d 37.

And none of the appellees was in privity with any party to the State court proceedings. So far as the appellees are concerned, the instant action is for recovery out of property which was fraudulently conveyed to them during William S. Heigho's lifetime and which they acquired prior to, and not through, the probate proceeding on his estate. Having acquired the fraudulently-transferred trust property prior to the institution of the probate proceeding, appellees are not successors in interest to the Heigho estate within the meaning of the *res judicata* rule: *Holman v. Toten,* 54 Cal. App. 2d 309, 314, 128 P. 2d 808.

Thus, the asserted *res judicata* for which appellees contend fails for two independent reasons, viz.: (1) want of identity of issues and (2) want of identity or privity of parties.

Lastly, it should be said that under California law, even where *res judicata* is established (as it was not here) it does not always preclude re-examination of a question. There are cases, admittedly rare, where the doctrine "will not be applied so rigidly as to defeat the ends of justice or important questions of policy." (*Greenfield v. Mather,* 32 Cal. 2d 23, 35, 194 P. 2d 1.) But this is not a case in which the limits of the doctrine need be explored, for on conventional principles it is clear that *res judicata* does not exist.

II.

The Circumstance That Appellants' Probate Claim Against the Estate of the Deceased Fraudulent Grantor Is Barred Does Not Furnish Appellees as Transferees an Absolute Defense so as to Entitle Them to Dismissal of the Action Against Them on Motion.

As we have seen, appellees' *res judicata* defense does not support the judgment of dismissal. It remains to determine whether the judgment is supportable on another ground. The only other ground suggested is what is stated in Judge Kunzel's memorandum order, which says that in order to bring an action against a transferee "it must appear that the claim of plaintiffs has been reduced to judgment or is capable of being reduced to judgment"—evidently referring to judgment against the transferor [R. 14].

But under California law, a claim need not be first reduced to judgment in order to furnish a foundation for an action to set aside fraudulent conveyances:

Section 3439.09, California Civil Code.

As to the other alternative, the District Court did not cite authority for the proposition that the claim must be capable of being reduced to judgment against the transferor in order to permit an action against transferees.

The precise question here is whether a creditor whose recourse against the estate of a deceased debtor-transferor has been lost for failure to establish a claim in probate is thereby prevented from proceeding against fraudulently-conveyed property in the hands of transferees. We have found no California decision on this

point. The question is covered in an annotation at 103 A. L. R. 566, citing cases both ways. Among them is *Armstrong v. Croft,* 71 Tenn. 191, holding that a statutory limitation on the filing of probate claims was solely for the benefit of the estate, and that a creditor could proceed against transferees of fraudulently-conveyed property despite his failure to present a timely probate claim against the estate of the deceased debtor-transferor. The case of *Markward v. Murrah,* .... Tex. ....., 156 S. W. 2d 971, noted at 138 A. L. R. 246, holds that it is not necessary for a creditor to present his claim in probate and have it allowed before proceeding against property fraudulently conveyed by the decedent.

In California it seems that the running of a statute of limitation in favor of a debtor-transferor does not necessarily prevent the creditor from proceeding against transferees. In *Goldberg, Bowen & Co. v. Demick,* 77 Cal. App. 535, 247 P. 2d 261, transferees were held not entitled to assert a statute of limitations defense which was seemingly available to the debtor-transferor.

And in the old case of *Marshall v. Buchanan,* 35 Cal. 264, a fraudulent transferee was held estopped by inequitable conduct to plead a statute of limitations defense which was seemingly available to the debtor-transferor. In the instant case the evidence to be adduced at the trial may support such an estoppel. There is reason to believe that appellee Barbara Bogart Heigho actively participated in concealing the whereabouts of William S. Heigho from process servers so that service was not obtained on him in the San Bernardino County action. Also, while acting as executrix of Heigho's will she evidently gave incorrect in-

formation which led the inheritance tax appraiser to refer in his filed report to a 1946 trust rather than the 1951 trusts which Heigho established shortly after he incurred the obligation sued on. That might have thrown appellants' then attorneys (the Surr & Hellyer defendants) off the track. Such questions should be determined at a trial; they were not and could not be decided on a motion to dismiss based on asserted *res judicata*.

It is at least arguable that appellants have the right to proceed against appellees as fraudulent transferees although appellants' claim against Heigho's probate estate is barred. Appellants' doubt on this subject led them to plead alternative claims against the two sets of defendants. If either set of defendants is to be let out it should be after full inquiry into the facts at trial and not on a motion to dismiss.

Conclusion.

It is submitted that the District Court erred in granting appellees' motion to dismiss and rendering judgment of dismissal and that the judgment should be reversed and the cause remanded for further proceedings against appellees as well as the other defendants.

Respectfully submitted,

Richard A. Perkins,
Attorney for Appellants.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

RICHARD A. PERKINS
Attorney for Appellants.

APPENDIX.

Statutes.

California Civil Code:

§3439.09. (a) Where a conveyance or obligation is fraudulent as to a creditor, such creditor, when his claim has matured, may, as against any person except a purchaser or encumbrancer for fair consideration without knowledge of the fraud at the time of the purchase, or one who has derived title immediately or mediately from such a purchaser or encumbrancer:

(1) Have the conveyance set aside or obligation annulled to the extent necessary to satisfy his claim * * *

California Code of Civil Procedure:

§1905. A judicial record of this state * * * may be proved by the production of the original, or by a copy thereof, certified by the clerk or other person having the legal custody thereof. * * *

§1908. The effect of a judgment or final order in an action or special proceeding before a court or judge of this State * * * having jurisdiction to pronounce the judgment or order, is as follows:

1. In case of a judgment or order against a specific thing, or in respect to the probate of a will, or the administration of the estate of a decedent, or in respect to the personal, political, or legal condition or relation of a particular person, the judgment or order is conclusive upon the title to the thing, the will, or administration, or the condition or relation of the person.

2. In other cases, the judgment or order is, in respect to the matter directly adjudged, conclusive be-

tween the parties and their successors in interest by title subsequent to the commencement of the action or special proceeding, litigating for the same thing under the same title and in the same capacity, provided they have notice, actual or constructive, of the pendency of the action or proceeding.

§1911. That only is deemed to have been adjudged in a former judgment which appears upon its face to have been so adjudged, or which was actually and necessarily included therein or necessary thereto.

California Probate Code:

§579. If the decedent, in his lifetime, conveyed any real or personal property, or any right or interest therein, with intent to defraud his creditors, or to avoid any obligation due another, or made a conveyance that by law is void as against creditors, or made a gift of property in view of death, and there is a deficiency of assets in the hands of the executor or administrator, the latter, on application of any creditor, must commence and prosecute to final judgment an action for the recovery of the same for the benefit of the creditors.

§714. When a claim is rejected either by the executor or administrator or by the judge, written notice of such rejection shall be given by the executor or administrator to the holder of the claim or to the person filing or presenting it, and the holder must bring suit in the proper court against the executor or administrator, within three months after the date of service of such notice if the claim is then due, or, if not, within two months after it becomes due; otherwise the claim shall be forever barred. * * *

§1021. In its decree [of distribution] the court must name the persons and the proportions or parts to which each is entitled, and such persons may demand, sue for, and recover their respective shares from the executor or administrator, or any person having the same in possession. Such order or decree, when it becomes final, is conclusive as to the rights of heirs, devisees and legatees.

§1067. The final settlement of an estate, as in this chapter provided, shall not prevent a subsequent issue of letters testamentary or of administration, or of administration with the will annexed, if other property of the estate is discovered, or if it becomes necessary or proper for any cause that letters should be again issued.

No. 18709

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

FORREST LAIDLEY and GEORGE P. VYE,

Appellants,

vs.

BARBARA BOGART HEIGHO, MAXWELL STEVENS HEIGHO and SECURITY-FIRST NATIONAL BANK,

Appellees.

APPELLEES' BRIEF.

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TOPICAL INDEX

TABLE OF AUTHORITIE SCITED

Cases — Page

No. 18709

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APPELLEES' BRIEF.

Statement of Facts.

February 5, 1957: Appellee, Barbara B. Heigho, was appointed executrix of the estate of her deceased husband, William Stevens Heigho, in Probate Proceedings in the Superior Court of California, for the County of Los Angeles.[1] [R. p. 33.] Outside the probate estate decedent had a revocable living trust. [R. p. 37.]

August 22, 1957: A claim was filed in the probate estate and approved therein, for legal services in the amount of $6,010, less $1,000 theretofore paid. The claim stated that the legal services were, ". . . *exclusive of the work done in connection with the stock of Calvert Lithographing Company which is an asset*

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[1]"R." refers to the Clerk's Transcript of Record. "Tr." refers to the Reporter's Transcript.

of the William S. Heigho Trust with the Farmers and Merchants Office of The Security First National Bank, Los Angeles, California". [R. p. 37.]

April 24, 1958: Appellants herein, filed their claim in said estate for an alleged debt which they claimed was due them from decedent, as of 1950, upon his alleged agreement to pay a brokerage fee commission in an amount of $117,992.50. [R. p. 33.]

May 5, 1958: The executrix duly rejected said claim and duly gave notice thereof. [R. p. 33.]

September 8, 1958: Report of California Inheritance Tax Appraiser was filed by him listing all probate estate assets and assets of the Trust at the Farmers & Merchants Office of the Security First National Bank, Los Angeles, of the value of $423,902.99, and setting forth the amount of inheritance and transfer taxes due. [R. pp. 33-34.]

September 9, 1958: First and Final Account and Petition for Distribution was filed and notice of hearing thereof was duly and regularly given. Among allegations in said Account and Petition was one concerning the filing and rejection of the Laidley-Vye (appellants) claim; and an allegation that no suit based thereon had been instituted against the executrix of the estate within the statutory period of three months. [R. p. 34.]

October 2, 1958: Decree approving final account and ordering distribution as prayed, including distribution of "all other property of said estate whether described herein or not." [R. p. 34.]

October 6, 1958: Final Decree was entered in judgment book. [R. p. 34.]

October 31, 1958: Executrix discharged, distribution having been fully made as provided by Final Decree. [R. p. 34.]

December 29, 1959: More than a year later, appellants here, Laidley and Vye, through their attorneys petitioned to re-open the estate, having previously failed to take any action on, or litigate their claim as required by law, and having failed to appeal from said Final Decree of Distribution. [R. pp. 34-35.]

March 11, 1960: The Superior Court entered an order denying said petition to re-open the estate. [R. p. 32.]

November 15, 1960: In an appeal taken by Appellants to the District Court of Appeal of the State of California from the Order denying said petition to re-open the estate the said order was affirmed. [R. pp. 30-42; *Estate of William Stevens Heigho, deceased,* 186 C. A. 2d 300; 9 Cal. Rptr. 196.]

July 5, 1961: Appellants filed their amended complaint in the action now on appeal herein. [R. pp. 2-11.]

October 24, 1961: Order granting motions of Appellees to be dismissed was entered herein. [R. pp. 47-48.]

October 4, 1962: Appellants filed Motion to Vacate the said Order Granting Appellees' Motions to dismiss. [R. pp. 49-50.]

December 10, 1962: Order entered denying Appellants' Motion to Vacate the Order of October 24, 1961, dismissing Appellees. [Tr., Dec. 10/62.]

February 11, 1963: Appellants filed Motion (a) for reconsideration of motion to vacate order of dismissal or (b) in the alternative for entry of judgment pursuant to Rule 54(b) F. R. C. P. [R. pp. 96-97.]

February 25, 1963: Appellants' Motion for reconsideration of their motion to vacate the Order dismissing Appellees was denied, and the motion for Entry of Judgment, pursuant to Rule 54(B) F. R. C. P. was granted. [Tr., February 25, 1963.]

March 18, 1963: Judgment of Dismissal of Appellees, pursuant to Rule 54(b) F. R. C. P., entered. [R. pp. 104-105.]

Statement Before Argument.

The record herein establishes a complete defense:

Appellants, by suit against Appellees, the distributees of the estate of William S. Heigho, Dec'd., are seeking to establish a claim that Heigho is indebted to them.

However, Appellants heretofore have been adjudicated to be barred from proceeding to establish said claim as a debt due them from Heigho; the Heigho probate estate has been closed and the California Courts have adjudicated that it may not be reopened. [R. p. 34.]

Therefore, without either Heigho, or his estate, Appellants lack the indispensable party defendant necessary ever to establish themselves as his creditors, and this appeal must be dismissed.

Appellees have further answered Appellants' Brief, in argument following.

Statement of Points of Appellees' Argument.

I.

The issues between Appellants and Appellees are *res judicata.*

II.

Appellants' claim against the deceased Heigho and Appellees has heretofore been litigated in California Probate Court proceedings, and adjudicated "forever barred."

III.

Heigho is deceased. His estate is closed. Without either (indispensable parties) Appellants' claim cannot again be litigated.

IV.

Decedent's alleged creditors can proceed only through the estate.

V.

Comment on Appellants' Brief.

I.

The Issues Between Appellants and Appellees Are Res Judicata.

Appellants sue herein to establish (as against Appellees, who are a probate estate distributee, and a trustee and beneficiaries of an *inter vivos* revocable trust of William S. Heigho, deceased) a claim of an indebtedness allegedly due from said deceased, "for brokers' commissions", they assert were earned in 1950.

Appellants do this in spite of the fact that they heretofore appeared as parties in Probate Court proceedings, in California, in the Estate of Heigho, as

claimants, and filed therein, on April 24, 1958, a regular estate claim for this same alleged indebtedness, which was adjudicated against them.

Said claim was rejected May 5, 1958, and due notice thereof given Appellants. Appellants took no further action whatsoever on said claim.

On October 6, 1958, a final decree was entered in said probate proceedings, the court approved and ratified the rejection of the Appellants' claim and found and ordered that said claim was "forever barred", as a debt due Appellants.

Said Probate Court decree has never been challenged.

Therefore, the claim of the Appellants here, as stated in *Estate of Heigho* (1960), 186 Cal. App. 2d 360-370 [9 Cal. Rptr. 196], has been fully "adjudicated by the decree of final distribution, . . ."

These same claimants are now before this Court, as Appellants, on the same claim so adjudicated by the California Court. The California Code of Civil Procedure, section 1911, provides that what is deemed adjudicated in a former judgment, is that which appears upon its face or which was actually and necessarily included therein or necessary thereto.

Because of said prior adjudication the Appellees here, who are the distributees of Heigho's estate, are entitled to an affirmance of the judgment and order of the United States District Court, dismissing them from this case.

The established doctrine of *res judicata,* is a complete bar to the present action against Appellees, who are the same parties and privies thereto (taking through

William S. Heigho, dec'd.) as were the parties in the California State Court proceedings.

When issues pleaded in a complaint have been fully adjudicated by a court of competent jurisdiction another trial on the same issues is barred by such prior decision and the defense of *res judicata* may be raised by motion to dismiss. *Curtis v. Utah Fuel Co.* (D.C. N. J. 1941), 2 F. R. D. 570, affirmed 132 F. 2d 321; Cert. Denied 63 S. Ct. 933, 318 U. S. 789, 87 L. ed. 1156 (wherein plaintiff attempted to try in a federal court a matter already adjudicated by State Court as to certain defendants; said defendant's motion to strike the complaint and to quash the summons was granted).

In *Ballard v. First National Bank of Birmingham* (U. S. 5th Cir. 1958), 259 F. 2d 681, at page 683, the Court said as to the rule of *res judicata:*

> "It rests on the finality of judgments in the interest of the end of litigation and it requires that the fact or issue adjudicated remain adjudicated. It, in short, is that one, who has permitted a final judgment to go against him, is estopped, by that judgment from contending elsewhere against the parties to it and their privies that the fact or issue is otherwise than as there adjudged."
>
> *Bennett v. Commissioner of Internal Revenue* (U. S. 5th Cir. 1940), 113 F. 2d 837, 839.
>
> "Parties and their privies are made to abide definitive and final judgments and litigations are concluded."

As said in *Monagas v. Vidal* (U. S. Cir. 1st, 1948) 170 F. 2d 99 (Cert. denied, Jan. 17, 1949) on page 106, concerning *res judicata:*

> "It is a rule of judicial administration grounded upon the need for putting a period to litigation, for it is to the interest of the public in general and of particular litigants alike that there be an end to litigation which without the doctrine would be endless."

The law of California, directly relating to this case, is set forth in the California Code of Civil Procedure, Section 1908. It provides that the said final order of distribution of the California Superior Court is a conclusive determination of each and every one of the rights asserted herein by the Appellants:

> "The effect of a judgment or final order in an action or special proceeding before a court or judge of this state, or of the United States, having jurisdiction to pronounce the judgment or order, is as follows:
>
> 1. In case of a judgment or order against a specific thing, or in respect to the probate of a will, or the administration of the estate of a decedent, . . . the judgment or order is conclusive upon the title to the thing, the will, or administration, or the condition or relation of the person.
>
> 2. In other cases, the judgment or order is, in respect to the matter directly adjudged, conclusive between the parties and their successors in interest by title subsequent to the commencement of the action or special proceeding, litigating for the same thing under the same title and in the same

> capacity, provided they have notice, actual or constructive, of the pendency of the action or proceeding."

It is the right or obligation to be enforced, not the remedy or relief, which determines the sameness of the causes of action. The Courts have established a test of the applicability of the doctrine of *res judicata.*

As said in *Morrison v. Willhoit* (1944), 62 Cal. App. 2d 830, 839; 145 P. 2d 707:

> "Where evidence used to establish a demand or a defense is identical with that used in a former action between the same parties, the doctrine of res judicata is clearly applicable."

Taylor v. Castle (1871), 42 Cal. 367, 372, states:

> "The cause of action is said to be the same where the same evidence will support both actions; or, rather, the judgment in the former action will be a bar, provided the evidence necessary to sustain a judgment for the plaintiff in the present action would have authorized a judgment for the plaintiff in the former."

This test when applied to the case at bar and to the Appellants' case in the California Superior Court, shows that the evidence in each of the cases necessarily is the same. The claim in the California Court and the claim here both arise out of the same alleged contract, for the same alleged brokerage services, which Appellants assert they rendered for the deceased William S. Heigho.

It is obvious from the record, that in any action, in any court, to establish their claim, Appellants must prove the same chain of events, to wit:

(1) A legal contract for services to William S. Heigho, deceased.

(2) That they became entitled to payment thereunder.

(3) That they have not been paid.

This same chain of proof necessarily exists in both cases. Therefore, the bar of *res judicata* applies, in that in each case, Appellants necessarily must proceed against the deceased Heigho, or his estate (which they cannot do) before reaching Appellees.

II.

Appellants' Claim Against the Deceased Heigho and Appellees Has Heretofore Been Litigated in California Probate Court Proceedings, and Adjudicated "Forever Barred."

Appellants claim here to establish a debt due them from Heigho, was heretofore filed and litigated by them, in the California Probate Court proceedings in the estate of Heigho.

In said proceedings, by Final Decree of Distribution, Appellants' claim was adjudicated "forever barred", and the Heigho estate, including "all other property of said estate whether described herein or not" was distributed. [R. p. 34.]

In litigation instituted over a year later by Appellants to re-open the Heigho estate and appoint an administrator, so that Appellants might sue in an effort to establish said claim, the California courts, on November 15, 1960, adjudicated that the Heigho estate could not be re-opened. [R. pp. 30-42.]

On July 5, 1961, Appellants impleaded, as alternate defendants, the said Heigho distributees, in this action

in the United States District Court; on the same claim already adjudicated in the California courts. [R. pp. 2-10.]

Upon Appellees' motions, the United States District Court gave full faith and credit to the prior judgments and orders of the California court, and dismissed said Appellees from the action.

Said Order of Dismissal is based on the established record that Appellants' claim has not been—and is incapable of being—reduced to judgment; that the claim is forever barred by the provisions of Section 714 of the California Probate Code, for having failed to bring suit thereon within the time provided, and the California Courts' adjudication that the Heigho estate may not be re-opened for the purpose of bringing an action on the claim. *Estate of Heigho* (1960), 186 Cal. App. 2d 360, 9 Cal. Rptr. 196. [R. pp. 30-42.]

Section 714, California Probate Code provides:

> "When a claim is rejected * * * written notice of such rejection shall be given by the executor or administrator to the holder of the claim * * * and the holder must bring suit in the proper court against the executor or administrator, within three months after the date of service of such notice if the claim is then due * * * otherwise the claim shall be forever barred."

As admitted by Appellants and established by the record, the said Appellants failed to bring suit against the executrix within the statutory period, or at all, and under and pursuant to said statute, their claim became "forever barred".

Subsequently the fact that Appellants' claim was forever barred was affirmed by the California District Court of Appeal. In said Court's decision, the reason and the necessity for said rule of statutory limitation are set forth in detail, and include the public policy of prompt settlement of estates not only for the sake of creditors but also for the benefit of heirs and beneficiaries, the rendering of final accounts and distribution, as well as the payment of inheritance and federal estate taxes. [R. pp. 37-38, 40.]

The limitation of Section 714, California Probate Code, like all statutes of limitation, has been enacted to "promote justice by preventing the assertion of stale claims". *Day v. Green* (1962), 207 A. C. A. 320 at p. 336.

Because of this, as said in *Beard v. Herbert C. Melvin, as executor* (1943), 60 Cal. App. 2d 421, 431; 14 P. 2d 720:

> "* * * the consequences of the failure to comply with the statute must be borne by the party who seeks to enforce the agreement, and it follows that plaintiff has no cause of action on the contract."

The United States Courts have never hesitated to give full faith and credit to the Court's decisions and the laws, of the several states. [*Erie v. Tompkins* (1938), 304 U. S. Supreme Court 64; 82 L. Ed. 1188.]

III.

Heigho Is Deceased. His Estate Is Closed. Without Either (Indispensable Parties) Appellants' Claim Cannot Again Be Litigated.

It is fundamental that a court is without jurisdiction to proceed to the trial of an action, when an indispensable party is missing.

The indispensable party, Heigho (or, being deceased, the Executor or Administrator of his estate) is missing here.

The Appellants' complaint herein alleges that Heigho became indebted to them under a contract of employment, for a brokers' commission for services rendered. [R. p. 4.]

It is obvious that in any action to establish a debt due, under such a contract, the indispensable party defendant is the person who allegedly entered into the contract.

In this action Heigho is the sole and only person alleged to have been a party to said alleged contract and to have become liable to Appellants under its terms.

Thus it follows that the indispensable party to this action is Heigho (or his estate). Without him (or his estate representative) there is no way that any such contractual obligation as claimed, can be established. Both are missing. [California Civil Code 1550.]

That Heigho is an indispensable party seems even beyond question. Indispensable parties are "* * *

those who have an interest in the controversy of such a nature that a final decree cannot be made without either affecting that interest or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience. Unless these are made parties, the court will not entertain the suit."

Halpin v. Savannah River Electric Co. (1930), (4th Cir.) 41 F. 2d 329, 330.

Also:

Shell Development Co. v. Universal Oil Products Co. (C.C.A. Del.) 157 F. 2d 421;

Baird v. Peoples Bank & Trust Co. of Westfield (C.C.A. N. J.), 120 F. 2d 1001.

By reason of the Appellants' claim being forever barred [Cal. Prob. Code 714, *supra*] and the refusal of the California Courts to re-open the Heigho estate and appoint an administrator, Appellants are left bereft of the indispensable party defendant, in any court proceeding.

As these matters stand clearly established, the United States District Court could not do otherwise than dismiss the Heigho defendants.

In the case of *McShan v. Sherill* (1960), 283 F. 2d 462 [Ninth Circuit], this Court stated that a decree, affecting title in property of persons not joined as parties, is improper; and further (page 464):

"The absence of indispensable parties can be raised at any time . . . Rule 12 (h) F.R.Civ.P. provides that the defense of failure to join an

indispensable party is never waived . . . *no Court can adjudicate directly upon a person's right, without the party being either actually or constructively before the Court.*" (Italics ours.)

Further:

"If such persons [indispensable parties] exist and are not accessible to service, or if their joinder would oust the district court of jurisdiction, the case must of course be dismissed."

Also:

Brodsky v. Perth (1958-Third Circuit), 259 F. 2d 705. Failure to join indispensable party is fatal to a complaint and it must be dismissed;

Martucci v. Mayer (1954-Third Circuit), 210 F. 2d 259. Action dismissed for want of jurisdiction because indispensable party missing;

Rule 19(a)(b), F. R. C. P. provide that indispensable parties must be joined in an action. 3 *Moore Federal Practice,* 2152-53.

Appellants reference to section 3439.09, of the California Civil Code, relating to "Remedies of Creditors: On maturity of Claim.", has no application here. Appellants are not creditors, and they cannot become creditors because they have been "forever barred" from establishing the claim alleged in their amended complaint. [*Supra,* II and III.]

IV.

A Decedent's Alleged Creditor Can Proceed Only Through Estate.

The following comments are necessary because Appellants, in their opening brief, designate themselves as "creditors" of Heigho—although they are only claimants—and by asserting that in 1951, Heigho transferred property (to his revocable *inter vivos* trust) "for the purpose of defrauding Appellants' assignors", which left "Heigho insolvent". They admit however that "he retained the power of revocation". (Appellants Brief, pp. 2-3.)

The record clearly establishes that Appellants are claimants here on a claim which heretofore has been adjudicated "forever barred". [R. p. 33 and p. 38.]

In the California courts, Appellants sued to reopen the Heigho estate, on charges that the trust was "in fraud of creditors". The courts adjudicated there was no fraud. [R. pp. 36-37.]

The courts found that the inheritance tax appraiser's report contained, and described, the trust assets; and that the inheritance and transfer taxes due thereon were set forth and paid. [R. pp. 33-34.]

That the assets of the trust were available, if needed to pay decedent's creditors, was never questioned.

Appellants made no objection to the estate being closed, and their claim became barred by the decree of final distribution. [R. p. 38.]

The California Probate Code, Sections 579-580, provides for bringing into the probate estate any assets of decedent outside the probate inventory, when required to pay decedent's creditors.

The said Code Sections 579-580 extend to all properties of decedent including any assets he may have conveyed with intent to defraud creditors.

The code further provides that the executor or administrator must bring the action to recover the assets and, therefore, are indispensable parties.

Beswick v. Churchill (1913), 22 Cal. App. 404; 134 Pac. 722;

Beswick v. Dorris, et al. (1909), 174 Fed. 502;
Staniels v. Copeland (1941), 48 Cal. App. 2d 124; 119 P. 2d 396.

V.

Comment on Appellants' Brief.

In Appellants' "Questions Presented" [Appellants' Brief, pp. 5-6] they ask if Appellees' affirmative defense of *res judicata* was established by the showing made, which did not include an authenticated copy of any judgment on which Appellees relied.

This suggestion of lack of adequate evidence and proof of Appellees' position is raised herein by Appellants, for the first time. It was not raised in the United States District Court. Such a suggestion is completely without merit for the following reasons:

(a) On Appellees' motions to be dismissed, Appellants consented thereto. Appellants' counsel told the court that in his opinion the Appellees' defense of *res judicata* was good. He said: ". . . Plaintiffs' counsel is unable to state to the court any reason why the defense is not good." [R. p. 45, lines 6-9.] So far as Appellants are concerned the U. S. District Court's Order was in effect a consent order.

(b) About a year subsequent to the Order, Appellants moved to Vacate the Order. The motion was denied. Later Appellants moved again to vacate the Order or, in the alternative, to enter judgment thereon. The request to enter judgment was granted. [R. pp. 96-97; 104-105.]

(c) Prior to Appellants' brief herein, the question of an authenticated copy of the California court judgment was never raised. Appellants were parties in the State court proceedings. An affidavit of George R. Larwill, one of counsel for Appellees, filed in support of Appellees' motions to be dismissed, contained statements of evidence [R. pp. 26-42] acknowledged and accepted by Appellants. [R. p. 45, lines 5-24.] A certified copy of the decision in the case of *Estate of Heigho,* 186 Cal. App. 2d 360 was a part of the affidavit. [R. pp. 30-42.]

On the foregoing record of Appellants' acceptance and consent to the order of dismissal, they cannot now be heard to complain.

Moreover it is a well settled rule of law that the theory upon which a case was tried in the court below must be strictly adhered to on appeal or review. A party will not be permitted by an Appellate Court to assume a position inconsistent with that taken by him in the trial court. [*Lynch v. United States,* 292 U. S. 571, 78 L. Ed. 1434, 54 S. Ct. 840.]

Conclusion.

The Judgment and Order of the United States District Court, dismissing the three Heigho defendants, the Appellees here, should be affirmed.

Respectfully submitted,

LARWILL & WOLFE,
By GEORGE R. LARWILL, and
CHARLES W. WOLFE,
Attorneys for Appellees.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

GEORGE R. LARWILL.

No. 18709

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

FORREST LAIDLEY and GEORGE P. VYE,

Appellants,

vs.

BARBARA BOGART HEIGHO, MAXWELL STEVENS HEIGHO and SECURITY-FIRST NATIONAL BANK,

Appellees.

APPELLANTS' REPLY BRIEF.

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TOPICAL INDEX

TABLE OF AUTHORITIES CITED

No. 18709

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

FORREST LAIDLEY and GEORGE P. VYE,

Appellants,

vs.

BARBARA BOGART HEIGHO, MAXWELL STEVENS HEIGHO and SECURITY-FIRST NATIONAL BANK,

Appellees.

APPELLANTS' REPLY BRIEF.

Preliminary Statement.

Appellants submit the following in reply to appellees' brief.

In their opening brief appellants discussed the several legal principles which are, or are asserted to be, involved, with specific reference to the record in this case. And we made the following points: (1) that the judgment of dismissal was not justified on the basis of *res judicata;* and (2) that the barring of appellants' probate claim against the estate of William S. Heigho, deceased, by a probate statute of limitations did not necessarily constitute a defense to appellants' action against appellees as transferees under an *inter vivos* fraudulent conveyance.

We regret that appellees' brief does not attempt to meet our contentions point by point so that the opposing

contentions could readily be matched up and judged, one against the other. Upon analysis, appellees' brief is seen to do the following:

1. Appellees repeat generalities concerning the doctrine of *res judicata,* without specific application to the facts of this case, and continue to assert that appellants' claim is barred thereby, without answering appellants' specific contentions;

2. Appellees do not discuss our Point II or cite any authority for their (assumed) proposition that a statute of limitations defense available to a debtor (or his probate estate) necessarily bars an action to recover out of fraudulently-conveyed property in the hands of his transferees; and

3. Appellees now contend:

(a) That the judgment of dismissal is justified for want of an indispensable party, *viz:* Heigho or his probate estate;

(b) That the procedure authorized by Section 579, California Probate Code, is exclusive, that is to say, that creditors may not proceed directly against transferees to recover out of fraudulently-conveyed property; and

(c) That the judgment under review was a consent judgment and hence not appealable.

In what follows we shall deal with appellees' new contentions.

ARGUMENT.

I.

There Is No Lack of Any Indispensable Party.

Contending that Heigho or his probate estate is an indispensable party, appellees assert general propositions concerning indispensable parties and cite decisions which have nothing to do with this case.

In our opening brief we pointed out that a living debtor-transferor is not a necessary or indispensable party to an action against transferees:

> Section 3439.09, California Civil Code (rather than Code of Civil Procedure as mistakenly cited on page 4 of our opening brief).

And the personal representative of a deceased fraudulent grantor is not a necessary party to an action against his transferees:

> *Liuzza v. Bell,* 40 Cal. App. 2d 417, 424, 104 P. 2d 1095.

II.

Suit by a Decedent's Personal Representative Under Section 579, California Probate Code, Is Not an Exclusive Procedure; Creditors May Proceed Directly Against Transferees.

Without citation of pertinent authority appellees assert that a "Decedent's Alleged Creditor Can Proceed Only Through Estate." Not so:

> *Liuzza v. Bell,* 40 Cal. App. 2d 417, 104 P. 2d 1095.

III.

The Judgment Under Review Was Not a Consent Judgment.

Appellees now contend that the judgment of dismissal was a consent judgment and hence not appealable, and in that connection they refer to a statement in appellants' memorandum of points and authorities filed August 23, 1961, to the effect that "As presently advised" their counsel was "unable to state to the Court any reason why the defense [of *res judicata*] is not good." [R. p. 45, lines 7-9.]

What happened was that after impleading the two sets of defendants, plaintiffs (appellants) were at first inclined to let them fight it out between themselves to determine which was liable. Accordingly, plaintiffs' counsel invited counsel for the "Surr & Hellyer defendants" to assume responsibility for opposing the motion to dismiss, and they did so. But plaintiffs did not consent to the granting of the motion.

In any event, the order of dismissal was merely interlocutory; and it is not the judgment under review. After the motion to dismiss was granted it became apparent to counsel for plaintiffs that at the trial the "Surr & Hellyer defendants" were still going to defend on the ground that the claim against appellees had not been lost, so that the "Surr & Hellyer defendants" were not liable for damages for negligence. At trial the court might reconsider its holding on the motion to dismiss (as it might: Rule 54(b), F. R. C. P.) and decide that the claim against the "Heigho Trust defendants" had not been lost after all. But such a decision, made in the absence of the "Heigho Trust

defendants," would not bind them, and plaintiffs would be under the necessity of starting all over against those defendants. It is obviously desirable for the action to be tried once and for all against both sets of defendants, so that the liability of one or the other can be finally determined. Accordingly, plaintiffs moved to vacate the order of dismissal, and when that motion was denied plaintiffs moved for reconsideration, which was also denied. Judgment of dismissal was entered pursuant to Rule 54(b), F. R. C. P., so as to permit plaintiffs to appeal. There is nothing to appellees' contention that the judgment was rendered by consent.

Conclusion.

It is submitted that appellees have not effectively answered the points made in appellants' opening brief, that appellees' new contentions are without merit, that the District Court erred in rendering judgment of dismissal, and that the judgment should be reversed and the cause remanded for further proceedings against appellees as well as the other defendants.

Respectfully submitted,

Richard A. Perkins,
Attorney for Appellants.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

RICHARD A. PERKINS,
Attorney for Appellants.

No. 18711

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

JOHN LEE HESTER,

Appellee.

Appellant's Opening Brief and Petition for Writ of Mandamus.

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TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Cases

Rules

No. 18711

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOHN LEE HESTER,

Defendant.

Application for Leave to File a Petition for a Writ of Mandamus.

The United States of America moves in this Court for leave to file a petition, attached hereto, for a writ of mandamus. The United States further moves that in the event this Honorable Court determines that it does not have jurisdiction to hear the Government's appeal, notice of which was filed on May 15, 1963, a rule be entered and issued directing the Honorable William C. Mathes, District Court Judge, Southern District of California, to show cause why the writ of mandamus should not issue against him vacating his judgment of April 16, 1963, dismissing the indictment against John Lee Hester, and entering an order direct-

ing him to reinstate the indictment and set a date for trial.

Respectfully submitted,

FRANCIS C. WHELAN,
United States Attorney,

THOMAS R. SHERIDAN,
Assistant U. S. Attorney,
Chief, Criminal Section,

ROBERT L. BROSIO,
Assistant U. S. Attorney,

Attorneys for Appellant.

No. 18711

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOHN LEE HESTER,

Defendant.

Appellant's Opening Brief and Petition for Writ of Mandamus.

I.

STATEMENT OF THE PLEADINGS AND FACTS DISCLOSING JURISDICTION.

On January 29, 1963, the Federal Grand Jury for the Northern District of Florida, Tallahasse Division, returned a one-court indictment [C. T. 2][1] charging that the appellee, John Lee Hester on or about November 28, 1962 unlawfully transported in interstate commerce from Downey, California to Tallahassee, Florida, a stolen 1956 Pontiac automobile in violation of Section 2312 of Title 18, United States Code.

On February 8, 1963 the appellee filed a Motion for a Change of Venue [C. T. 3], requesting basically, that the trial be moved to Los Angeles, California since the appellee and all the witnesses resided in California.

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[1]C. T.—refers to Clerk's Transcript of Record.

On February 8, 1963 the appellee's motion, considered as a motion for transfer under the provisions of Rule 21(b), Federal Rules of Criminal Procedure, was granted and the cause transferred to the United States District Court for the Southern District of California, Central Division [C. T. 4].

The appellee was delivered by United States Marshals to Los Angeles in late March or early April 1963 [R. T. 7].[2] On April 8, 1963 the appellee's case was set for trial on April 16, 1963 before the Honorable William C. Mathes [C. T. 7].

On April 15, the appellee appeared before the Honorable William C. Mathes and petitioned the Court to withdraw the plea of not guilty previously entered and to enter a plea of guilty to the offense charged in the indictment. The plea of not guilty was withdrawn and the plea of guilty was entered [R. T. 5]. Appellee's counsel moved for immediate sentencing, which motion was granted [R. T. 6].

The Court thereafter revised its earlier position, rejected the plea of guilty, entered a plea of not guilty and ordered the case to jury trial [R. T. 15], the following morning.

On April 16, the Government filed a motion for a one-week's continuance on the basis that the presence of necessary witnesses could not be obtained on less than one day's notice. The Government's motion was denied.

Defense counsel thereupon at the direction of the Court moved for a dismissal of the indictment for

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[2]R. T.—refers to Reporter's Transcript of Proceedings.

failure of prosecution. The motion was granted and the indictment was dismissed, from which judgment the Government appeals [R. T. 19].

The jurisdiction of the United States District Court for the Southern District of California, Central Division, was based on Sections 2312 and 3231 of Title 18, United States Code.

On May 16, 1963 the appellant filed a notice of appeal [C. T. 11] from the order of the District Court dismissing the indictment.

Jurisdiction of the United States Court of Appeals for the Ninth Circuit is based upon Sections 1291 and 1294 of Title 28, United States Code and Section 3731 of Title 18, U. S. C. If this Honorable Court determines that it does not have jurisdiction of this matter under Section 3731, the United States requests in the alternative that this Court issue a writ of mandamus vacating the judgment of the Honorable William C. Mathes dated April 16 and order him to reinstate the Indictment and set a date for trial.

II.
STATUTES INVOLVED.

Sixth Amendment of the Constitution provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

18 United States Code, Section 2312 provides:

> "Whoever transports in interstate or foreign commerce a motor vehicle or aircraft, knowing the same to have been stolen, shall be fined not more than $5,000 or imprisoned not more than five years, or both."

Rule 48(b), Federal Rules of Criminal Procedure provides:

> "(b) By Court. If there is unnecessary delay in presenting the charge to a grand jury or in filing an information against a defendant who has been held to answer to the district court, or if there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment, information or complaint."

III.
QUESTION PRESENTED.

Did the District Court abuse its discretion in dismissing the indictment of January 29, 1963 for "want of prosection?"

IV.
STATEMENT OF THE CASE.

Since the sole issue before this Honorable Court is whether there was an abuse of judicial discretion in dismissing the indictment, the transcript of the proceedings in this case before the Honorable William C. Mathes composes the core of the subject matter for examination.

The appellee appeared before the Honorable William C. Mathes at 10:00 a.m. on April 15, 1963, announced, through his counsel, a desire to change his plea and offered a signed written petition to enter a plea of

guilty [R. T. 3, 4; Petition to enter plea of guilty, 27 F. R. D. 39, 50.07]. Prior notice of the desire to change plea had been given to the appellant's counsel.

The Court questioned the appellee and his counsel to determine that the plea was voluntary and made with understanding of the charge. The following colloquy occurred:

"The Court: Have you discussed it fully with your attorney, Mr. Stephen King, before you signed it?

Defendant Hester: Yes sir.

The Court: Do you feel you fully understand it?

Defendant Hester: Yes, sir.

The Court: Do you feel you fully understand the charge against you in the indictment?

Defendant Hester: Yes, sir.

The Court: Are you entirely sure you wish to confess that crime by pleading guilty to the indictment?

Defendant Hester: Yes, Sir.

The Court: Are you guilty of that crime?

Defendant Hester: Yes, sir.

The Court: In your opinion, Mr. King, is the plea of guilty which the defendant John Lee Hester now offers to the offense charged in the indictment voluntarily and understandingly offered?

Mr. King: Yes, your Honor.

The Court: And is it consistent with your advice to him?

Mr. King: It is, your Honor.

The Court: Very well. The clerk will enter a plea of guilty on behalf of the defendant John Lee Hester to the offense charged in the indictment."

After having satisfied itself as to the providency of the plea the Court granted the appellee's motion for immediate sentencing [R. T. 6].

In the statements made by both the appellee and his counsel certain matters were offered to the Court in mitigation of punishment for the appellee's violation of the "Dyer Act." The Court was requested to grant the appellee probation for this offense which carries a five year maximum sentence because he had already spent several months in jail, because he had a reasonably clean record, because he had a "good job waiting for him" and because he had not intended to permanently deprive the owner of his car [R. T. 7-9].

Government counsel thereupon pointed out to the Court that he had shown the entire report file to the defense counsel prior to the defendants change of plea. It was stated that this file disclosed that the appellee was given the car in the presence of several witnesses, all of whom had given the Federal Bureau of Investigation similar statements as to the circumstances in which the appellee had received the car from its owner. The appellee, according to these witnesses, had been loaned the car for the purpose of transporting himself from one point in Southern California to his home in Los Angeles.

Having been presented with the general circumstances of the charged offense the Court commented, "I was trying to learn *how he expected to get away with it.*" [R. T. 11, emphasis supplied].

The Court then proceeded to inform the appellee of a recent Dyer Act prosecution in which the jury had acquitted the defendant. In addition, the Court noted that

it was assuming that the appellee had ". . . violated the limits of the authority." Essentially, the Court attempted to indicate to the appellee the possible wisdom of changing his plea to one of not guilty. In order to give the appellee time to consider the matter the Court called a recess until the afternoon of the same day [R. T. 13-14].

When the Court was reconvened on the afternoon of April 16, 1963 the defendant was asked through his counsel as to whether or not he wished to let his plea stand. Counsel stated, "well, our position is the same as before."

At this point the Court rejected the plea of guilty, ordered the clerk to enter a plea of not guilty, and expressed the intention of hearing the case the following morning.

Government counsel then informed the Court that during the recess an attempt had been made to contact necessary witnesses because of the indications during the morning session that the guilty plea might be rejected and the case ordered to trial. As a result of this investigation, it had been determined that the car owner was driving a truck from coast to coast and could not possibly be available the following day. He stated, in addition, that another necessary witness was ill and could not appear on the following day.

The Court's reply to the statement that the Government would be unable to go to trial, was,

> "Yes, we will try the case tomorrow. I don't like to put the Government in that position. But probably that is a very just position to put the Government in."

Government counsel asked

"Put on the case without witnesses?"

The Court answered,

> "In this particular case, because of facts I shouldn't know and do know which came out on the discussion of the sentence." [R. T. 15-16].

The following day, Government Counsel presented a written Motion for a one week's continuance to the Court based on the unavailability of witnesses on such short notice [R. T. 18; C. T. 7]. In a supporting affidavit Government Counsel pointed out that after subpoenas had originally been issued, the defendant's counsel had informed the Government of the decision to enter a plea of guilty. At that time the Marshal's office had been contacted and the subpoenas recalled. The period of time between the afternoon on April 15 and the morning of April 16 had been insufficient to enable the Government to obtain the presence of witnesses. The most vital witness, the owner of the vehicle in question, could not be contacted since he was out of the state driving a truck cross country [C. T. 9].

At this point, for the first time, the appellee's counsel protested any delay in the trial. Less than twenty-four hours earlier counsel had informed the Court that the defendant's decision to plead guilty was in accord with his advice to his client. Government counsel stated that the defendant had been responsible for the substantial delay caused by transferring the case from

Florida to California, since he had moved for transfer under Rule 21.

The Court's then stated reaction was:

> "The Court: Of course, in view of what occurred yesterday, gentlemen, I know something about the Government's case here. Without reviewing all of those matters which you said yesterday, and in the light of it, I think in the interest of justice the defendant is entitled to his Sixth Amendment right to a speedy and public trial; and as he insists on the date now set—which I shall rule to be right now—I will deny the motion."

Having denied the motion for a continuance the Court stated to the defendant's counsel, "I will hear your motion." [R. T. 19]. The record gives no indication that counsel had exhibited any desire to make a motion. A motion for dismissal was then made and immediately granted. [R. T. 19].

VI.

SUMMARY OF ARGUMENT.

A. The dismissal of the complaint for stated want of the prosecution was of an arbitrary and unreasonable nature and a violation of judicial discretion.

B. This violation of discretion is of such an exceptional arbitrary and unreasonable nature that a Writ of Mandamus is an appropriate corrective measure in the event appeal of such a question is not available to the Government.

VII.

ARGUMENT.

A. This Dismissal of the Complaint for Stated Want of Prosecution Was of an Arbitrary and Unreasonable Nature and a Violation of Judicial Discretion.

Since the *stated* reason for dismissal of the indictment was for "want of prosecution" a close examination of the record is required to determine whether there was any such delay which *could be thought* to constitute a basis for, in effect, throwing the case out of court and depriving the Government of a day in court.

As previously stated, the appellee was apprehended by the Florida Highway Patrol of November 26, 1963. Some short time after that he was handed over to the federal authorities. On January 29, 1963 he was indicted for violating Section 2312 of Title 18, U. S. C. The record does not disclose any demand for earlier indictment by the appellee nor any unnecessary delay in indictment.

Very soon after the indictment, on February 8, 1963 the appellee filed a "Motion for a Change of Venue" to California. Since only slightly over a week had elapsed since the indictment, no unreasonable delay could possibly be thought to have transpired.

On February 15 the District Court interpreted the above motion as one for transfer under Rule 21(b) and granted the Motion ordering the case transferred to the District Court for the Southern District of California.

Thereafter and pursuant to that order the appellee was transported from Tallahassee to Los Angeles by

United States Marshals in the customary manner [R. T. 7].

There is every reasonable expectation that in the normal course of events the appellee would have received an earlier trial date in Florida, but for his motion for a "Change of Venue." Any delay caused by the transfer must be attributed to the appellee and not to the Government.

After the appellee arrived in Los Angeles, he was arraigned and his case set for trial with exemplary promptness. As the trial court stated: "Well, the delay hasn't been here." [R. T. 7].

It again must be stressed that the record discloses no demand for an earlier trial date by the appellee prior to the morning following the aborted sentencing. Clearly under the circumstances a continuance of one week did not violate the letter or spirit of Rule 48 of the Federal Rules of Criminal Procedure or of Article VI of the Constitution of the United States.

The record clearly shows that the appellee failed to substantiate his claim that he had been prejudiced by any delay in being brought to trial. Under these circumstances this failure of substantiation was only to be expected.

(See *United States v. Research Foundation,* 155 F. Supp. 650 (D. C. S. D. N. Y. 1957) and *United States v. Fassoulis,* 179 F. Supp. 645 (D. C. S. D. N. Y. 1959) concerning burden on defendant to assert claim to earlier trial.)

As the Court stated in *United States v. Alagia,* 17 F. R. D. 15, 16 (D. C. Del. 1955):

> "The question of when a defendant has been denied a speedy trial is necessarily a relative one, depending upon the circumstances of the particular case. The role which the defendant himself has played must be scrutinized in the same manner as the prosecution."

Scrutinization of the record in this case reveals that the defendant was responsible for substantial delay in moving for change of venue. Why this motion was put forward when the defendant decided to plead guilty after the case was transferred is a mystery for which the record provides no answer. As previously stated the Government was forced to ask for a reasonable continuance to permit the serving of subpoenas which had been previously recalled after the defendant had informed both the Court and the Government of his decision to change his plea to guilty. The recall of subpoenas under such circumstances is, of course, a customary step to save the Government needless expense.

In setting out the broad outlines as to when a motion for dismissal for want of prosecution would be granted, the court in *United States v. McWilliams,* 163 F. 2d 695, 696 (D.C. Cir. 1947), stated:

> "Usually the Court will permit the prosecution to decide whether he will bring a case to trial. But where it appears, as here, there is serious doubt as to the success of the case and that the defendants because of the long delays granted over their objections, cannot obtain a fair trial, the court should exercise its discretion to deny prosecution."

There, of course, could not be serious doubts as to the success of the instant case where the defendant, and his counsel, after having examined the entire case file of the Government [R. T. 7] and having been made fully aware of the case against him, still refused to change his plea of guilty, even though the Court had indicated such a plea might be improvident. Naturally the defendant and his counsel, being aware of the true facts and the ability of the Government to prove such facts, were in a far better position to evaluate the case than the Court which had the benefit of only a superficial description of such facts offered in lieu of a probation report at the immediate sentencing requested by the defendant following his plea of guilty.

Clearly the Court's exercise of its discretion in rejecting the plea of guilty was proper. When, however, that act is followed by arbitrary and unreasonable rulings denying the Government a short continuance and dismissing the case, a remedy is required.

When the examination of the time elements in question, particularly the period of short duration between the rejection of the plea of guilty and the trial date the following morning is considered with certain comments of the Court, there is strong indication that the dismissal was not in reality based on any failure of prosecution, but on unstated, but clearly implied grounds.

In forcing the Government into an impossible position, namely, a trial without witnesses, the Court stated:

> "I don't like to put the Government in that position. But probably that is a very just position to put the Government . . . In this particular

> case, because of facts I shouldn't know which came out on the discussion of the sentence." [R. T. 16-17].

What "facts" that the Court "shouldn't know" were referred to in the above statement. Seemingly the only "facts" could have been whatever the Court derived from both the defendant's and Government counsel's comments on the circumstances of the offense, the same "facts" which might possibly have indicated to the Court that there existed a possibility of acquittal if the case were sent to a jury [R. T. 14].

The above comments of the Court when expanded to their logical conclusion seemingly indicate that if the trial Court feels prior to the introduction of evidence that the defendant *might* be acquitted, the Government may be prevented from bringing the case to trial. Such a denial of an opportunity to obtain witnesses has as its direct effect a prevention of prosecution on a proper indictment.

Any doubts that the denial of a continuance and the order of dismissal were based not on any delay, but on the Court's opinion concerning the quantum of evidence against the defendant; must also collide with the Court's comments on the morning of April 16, 1963, when the Court stated that since it knew "something about the Government's case", the motion for dismissal would be granted [R. T. 18-19].

Under these circumstances such a ruling could only be an expression of either sympathy for the defendant—or lack of sympathy for Dyer Act prosecutions, neither of which reasons can constitute a basis for dismissal under Rule 48(b). If the court felt there was

a possibility of acquittal, it could, in the proper exercise of discretion, have rejected the guilty plea *and* allowed the Government time to obtain witnesses. By any reasonable view when the court rejected the plea and dismissed the indictment for "want of prosecution" it violated its discretion in a grossly arbitrary manner.

If the situation had been different and there had been strong indications that the Government would not be able to present a case even if given a short continuance, the order of dismissal might be within the bounds of discretion. Where, however, the defendant (through his qualified counsel), has had the opportunity to examine all the evidence against him and persists in a plea of guilty, the court could not possibly have grounds to conclude that there was anything more than a bare chance of acquittal if the case went to trial. In this situation the dismissal cannot be supported.

The Court's ruling, while entitled a dismissal for want of prosecution would appear in reality to be the granting of a motion for judgment of acquittal since it was not based on any delay but on the quantum of evidence against the defendant. The novel feature about such a judgment of acquittal is that it is granted before any evidence is taken and before, in fact, there is any trial. If a standard for the ruling on such a motion may be gleaned from the record it would appear to be the following. When such a novel motion for acquittal is made prior to trial any unsworn statements of a defendant made in mitigation of punishment which indicate the possible existence of a defense is to be given face value without even benefit of cross-examination, the time honored method of testing truth.

On the other hand, any evidence that the Government *would have been able to present if it were allowed to try its case,* will be viewed in a light most unfavorable. That such a standard conflicts with the view of the Supreme Court and the Ninth Circuit as expressed in *Glasser v. United States,* 315 U. S. 60 (1942), is rather clear.

If such an erroneous standard is to be struck down and the Government to be allowed its day in Court, a remedy must be granted.

B. This Violation of Discretion Is of Such an Exceptional, Arbitrary, and Unreasonable Nature That a Writ of Mandamus Is an Appropriate Corrective Measure in the Event Appeal of Such a Question Is Not Available to the Government.

The Government is proceeding in the alternative—by appeal and petition. Cognizant of this Honorable Court's decision in *United States v. Apex Distributing Company,* 270 F. 2d 747 (9th Cir. 1959), the Government's position is that if the Court determines that it does not have jurisdiction to hear the appeal because of the limitations of Section 3731 of Title 18, U. S. C., then a Writ of Mandamus should issue against the Honorable William C. Mathes, directing him to vacate his judgment of April 16, 1963, to reinstate the indictment and to set a date for trial.

Ex parte United States, 287 U. S. 241 (1932);
In re United States, 286 F. 2d 556 (1 Cir. 1961);
United States v. Lane, 284 F. 2d 935 (9 Cir. 1960); and
United States v. United States District Court, 238 F. 2d 713 (4 Cir. 1956), cert. den. 77 S. Ct. 382,

all hold that in a proper criminal case a writ of mandamus may issue to correct error.

As the Supreme Court pointed out in *Virginia v. Reves,* 100 U. S. 313, 323 (1879), a writ of mandamus may be issued where there has been an abuse of discretion. Merely because an unreasonable and arbitrary act is cloak under exercise of discretionary powers does not mean that a writ is not an appropriate remedy. In *United States v. United States District Court, supra,* a writ of mandamus was issued where a trial court abused its discretion in refusing to allow *subpoenas duces tecum.* These subpoenas were requested in order to bring before the grand jury certain business records requested in the course of an investigation to determine whether indictments for violation of antitrust laws should be returned. This writ was issued despite the fact that the trial court was supposedly acting in a discretionary area utilizing its supervisory powers over the grand jury.

Where the effect of a trial court's action is to arbitrarily deprive the Government of its day in court, a writ of mandamus is an appropriate remedy, as the Supreme Court indicated in *Ex parte United States, supra.* While the situation in that case differed from the instant cast in that it concerned the refusal to issue a bench warrant on an indictment, the trial judge's action in the instant case had an equal impact on the Government's right of prosecution on a properly returned indictment. Since the effect of the action is basically the same,

the factors which led the Supreme Court to issue a writ in the aforementioned case indicate the appropriateness of the remedy in the present situation.

If trial courts are to exercise their powers under Rule 48(b) of the Federal Rules of Criminal Procedure not only to dismiss cases where there has been a failure of prosecution, but also to dismiss any cases which do not meet their subjective standards as to the type of case the Government should prosecute, the indictment process is reduced to a farce.

The problem that is here presented to the Honorable Court cannot be considered as a mere error in the exercise of discretion. This dismissal which prevented the Government from exercising its right to prosecute on the basis of a proper indictment is an instance of a flagrant infringement on the separate powers delegated to the executive branch of the Government. The judgment in this case directly clashes with the long recognition by the courts of the discretionary powers vested in the executive to determine what cases shall be prosecuted—powers which courts have stated are not to be interfered with by the judiciary. *Pugach v. Klein,* 193 F. Supp. 630, 635 (D. C. E. D. Penn., 1961).

It is submitted that the instant case discloses a gross violation of the separation of powers coupled with an arbitrary and unreasonable abuse of discretion. Accordingly, the superior and supervisory powers of this Honorable Court are respectfully petitioned.

VIII.

CONCLUSION.

The order of the District Court dismissing the indictment should be reversed or, in the alternative the United States requests this Court to issue a writ vacating the judgment of the Honorable William C. Mathes, dated April 16, 1963, dismissing the above mentioned indictment and ordering him to reinstate the indictment and set a date for trial.

Respectfully submitted,

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Certificate.

I certify that in connection with the preparation of this Brief I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing Brief is in full compliance with those rules.

ROBERT L. BROSIO,
Assistant U. S. Attorney.

No. 18,712

United States Court of Appeals

For the Ninth Circuit

ROBERT SING CHOW,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLANT

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Subject Index

Table of Authorities Cited

Statutes

Congressional Reports

Texts

No. 18,712

United States Court of Appeals
For the Ninth Circuit

ROBERT SING CHOW,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

Appellant filed a petition for naturalization under Section 328 (8 USC 1439) of the Immigration and Nationality Act of 1952 in the United States District Court in and for the Northern District of California, Southern Division, on January 5, 1962. (T. 1-3.) His petition for naturalization was denied by District Judge Stanley A. Weigel on April 3, 1963. (T. 14.) Notice of appeal was filed with the Clerk of the above-entitled Court on April 10, 1963. (T. 16.)

Jurisdiction of the District Court to entertain the petition for naturalization is conferred by Section 310(a) of the Immigration and Nationality Act. (8 USC 1421.) The order of the District Court denying appellant's petition for United States citizenship is a final decision within the meaning of Section 128 of

the Judicial Code. (*Tuton v. U. S.*, 270 U.S. 568, 46 S. Ct. 425, 70 L.Ed. 738.)

Jurisdiction of the Court of Appeals to review the District Court's final order is conferred by Section 128 of the Judicial Code, as amended. (28 USC 1291.)

STATEMENT OF THE CASE

Appellant is a 25 year old single male, a native of China, who filed a petition for naturalization under Section 328 (8 USC 1439) of the Immigration and Nationality Act on January 5, 1962. On August 23, 1950 the appellant first applied for admission to the United States as a citizen thereof following his arrival at the Port of San Francisco, California on board the SS President Wilson. On October 17, 1950, a Board of Special Inquiry concluded that the appellant had failed to establish his claim to United States citizenship—such decision was affirmed on appeal. Thereafter, appellant filed a petition for a declaratory judgment of United States citizenship under Section 503 of the Nationality Act of 1940 in the United States District Court for the Northern District of California. An adverse judgment was entered by that Court on February 19, 1953. The adverse decision of the District Court was affirmed by the Court of Appeals for the Ninth Circuit on November 24, 1954. On a motion for rehearing, the Court of Appeals remanded the case to the District Court for further proceedings in March of 1955. On April 1, 1955, the United States District Court again denied the relief as prayed for

in the petition for declaratory judgment of United States citizenship.

On August 1, 1957, the appellant was inducted into the United States Army and served honorably in an active-duty status until July 31, 1959, at which time he was transferred into the United States Army Reserves, and the latter status continued until a date subsequent to filing of the petition for naturalization in the instant matter.

The Designated Naturalization Examiner recommended that the petition for naturalization be denied "on the grounds that the petitioner has failed to establish lawful admission to the United States for permanent residence". (T. 13.) The District Court accepted the recommendation of the Designated Naturalization Examiner and order that the petition for naturalization be denied. It is from that adverse decision that the present appeal follows.

STATUTES INVOLVED

All of the pertinent parts of

Section 328, Immigration and Nationality Act, (8 USC 1439),

Section 324, Immigration and Nationality Act, (8 USC 724),

Section 316, Immigration and Nationality Act, (8 USC 1427), and

Section 318, Immigration and Nationality Act, (8 USC 1429)

as are fully set forth in the Appendix hereto.

SPECIFICATION OF ERRORS

1. The District Court erred in holding that a petitioner for naturalization under Section 328 of the Immigration and Nationality Act must establish that he was lawfully admitted to the United States for permanent residence.

2. The District Court erred in denying appellant's petition for naturalization.

SUMMARY OF ARGUMENT

It is appellant's contention that Section 328 of the Immigration and Nationality Act of 1952 provides that any alien who has served in the Armed Forces of the United States continuously for an aggregate period of at least three years, who is serving at the time of filing such petition or within six months following discharge, who is a person of good moral character and attachment to the Constitution of the United States, may be naturalized without a lawful admission for permanent residence.

ARGUMENT

It has been held that the privilege of naturalization ripens into a right when a petitioner complies with all of the conditions prescribed by Congress.[1] The

[1] *U. S. v. Schwimmer,* 279 U.S. 645; *Tutun v. U. S.* 270 U.S. 568.

question before us is—what the the conditions prescribed by Congress for an alien seeking naturalization under Section 328 of the Immigration and Nationality Act? (8 USC 1439.)

It is asserted that there is no ambiguity in the language of Section 328 when reasonable and effective construction is given to all parts of that section. It is asserted that this appellant is entitled to United States citizenship under the statutory provisions of Section 328 of the Immigration and Nationality Act (8 USC 1439) and that

1. Section 328 by its own language clearly indicates that any person who files his petition for naturalization while serving in the Armed Forces of the United States, following more than three years of honorable service, need not comply with the requirements of Section 316(a) of the same Act (8 USC 1427(A));

2. That Section 318 of the same act (8 USC 1429) specifically exempts a petitioner under Section 328 from establishing lawful admission to the United States for permanent residence as a prerequisite to naturalization;

3. That Section 328 is entitled to the same construction as Section 324 of the Nationality Act of 1940 (8 USC 724), and

4. That the legislative history of the Immigration and Nationality Act of 1952 clearly indicates the Congressional intent to continue the expeditious naturalization provisions pertaining to persons in this cagetory.

POINT 1

Considering the language of Section 328 of the Immigration and Nationality Act of 1952 (8 USC 1439), it is possible to reach only one conclusion, i.e., that any person who has honorably served in the armed forces of the United States for an aggregate period or periods exceeding three years and filed his petition while still in such service or within six months thereafter does not have to comply with the requirements of Section 316(a) of the same Act (App. p. iv), in order to be eligible for this expeditious naturalization.

Subparagraph (a) of the 1952 Act provides that the petitioner "may be naturalized without having resided continuously immediately preceding the date of filing such person's petition in the United States for at least five years and in the state within which the petition for naturalization is filed for at least six months and *without having been physically present in the United States for any specified period* * * *". (Emphasis supplied.) Subparagraph (d) of the same Act, which sets forth the residence requirement for persons filing under the provisions of that section specifically provides that where a person files his petition more than six months after the termination of his honorable service, he must comply with the requirements of Section 316(a) of the same Act.

Section 316 of the Immigration and Nationality Act of 1952 (8 USC 1427) sets forth the general requirements in order to qualify for naturalization. Subparagraph (a) thereof pertains to residence. It is clear that any person seeking naturalization under

the general statute can only do so after he has resided continuously in the United States for a period of at least five years after being lawfully admitted to the United States for permanent residence. However, the 1952 Act sets forth certain exempt classes who do not necessarily have to meet all of the general requirement provisions of Section 316. For example, Section 319 (8 USC 1430) provides that an individual married to an American citizen spouse may be naturalized upon compliance with all of the requirements of Section 316 except that three years is substituted in lieu of the five-year period.

Section 329 (8 USC 1440) provides for the expeditious naturalization of those who performed honorable service in the armed forces of the United States during World War I or World War II. That section states that such naturalization can only be granted if the person was in the United States at the time of enlistment or induction whether or not he had been lawfully admitted to the United States for permanent residence, or in the alternative, if the inductment or enlistment was abroad that he was subsequently admitted to the United States for permanent residence. Section 330 (8 USC 1441) of the same Act provides for the expeditious naturalization of certain aliens who had aggregate honorable service of at least five years on board American vessels. If the person seeking the benefits of that section had five years of service prior to September 23, 1950, he is not required to establish a lawful admission for permanent residence. However, if the aggregate period of five years served on board American vessels is completed subsequent to

September 23, 1950, such person must have been lawfully admitted to the United States for permanent residence prior to filing his petition for naturalization.

The foregoing exemptions are cited in order to draw the attention of the Court to the fact that in each of the other exempt classes the section of law specifically sets forth the requirment concerning lawful admission to the United States for permanent residence. The absence of any such language in subparagraph (a) of Section 328 is indicative of the Congressional intention to exempt persons seeking this benefit from the provisions of that part.

Since the persons who filed their petitions under the provisions of Section 328 more than six months after termination of their service in the armed forces are required by the expressed provisions of subparagraph (d) to comply with the residence requirements of Section 316(a) of the same Act, exclusion of those who file while still in active service or within six months after termination of such service is implied.

It is a general rule of law that:

> "All parts, provisions, or sections of a section, must be read, considered, or construed together, and each must be considered with respect to, or in the light of, all the other provisions or sections, and construed in connection or harmony with the whole." 82 C.J.S. 694.

We do not feel that there is any ambiguity in the language of Section 328 when reasonable and effective construction is given to all parts of that section. Subparagraph (d) of Section 328 may be considered as a

proviso or an exception, reshaping or modifying the text of subparagraph (a). Subparagraph (d) was inserted with a purposeful and deliberate intention. Subparagraph (d) states that in some cases (where the petition is filed more than six months after termination of service) a person seeking naturalization under the provisions of subparagraph (a) must comply with the provisions of the general naturalization statute as contained in Section 316(a). Any other construction would read into the provisions of subparagraph (a) language which is not contained in the statute. Omission of the lawful admission provision in subparagraph (a) clearly indicates the Congressional intent to exempt persons seeking naturalization under this section from complying with those requirements.

The Court's attention is invited to the long established rule of law that in construing a statute, the intent and purpose of the act must be considered and further where there are general and special provisions covering the same subject, the special provisions will prevail. In the case of *Rogers v. United States*, 185 U.S. 83, the United States Supreme Court stated at page 87:

> "It is a canon of statutory construction that a later statute, general in its terms and not expressly repealing a prior special statute, will ordinarily not affect the special provisions of such earlier statute. In other words, where there are two statutes, the earlier special and the later general—the terms of the general broad enough to include the matter provided for in the special

> —the fact that one is special and the other is general creates a presumption that the special is to be considered as remaining an exception to the general, and the general will not be understood as repealing the special, unless a repeal is expressly named, or unless the provisions of the general are manifestly inconsistent with those of the special."

This same Court referred on page 89 to the opinion of Mr. Justice Christiancy speaking for the Supreme Court of the State of Michigan in the case of *Crane v. Reeder*, 22 Michigan 322, 344, and quoted from that case as follows:

> "Where there are two acts or provisions, one of which is special and particular, and certainly includes the matter in question, and the other general which, if standing alone, would include the same matter and thus conflict with the special act or provision, the special must be taken as intended to constitute an exception to the general act or provision, especially when such general and special acts or provisions are contemporaneous as the legislature is not to be presumed to have intended a conflict."

In the case of *McCaughn v. Hershey Chocolate Company*, 283 U.S. 488, at 492, the Court stated:

> "Possible doubts as to the proper construction of the language used should be resolved in the light of the administrative or legislative history."

See also:

Posadas v. National City Bank, 296 U.S. 497, at pp. 503-504.

The United States Court of Appeals for the Eighth Circuit in the case of *United States v. Windle,* 158 F2d 196, at page 199, stated:

> "We recognize the rule that generally special terms of a statute prevail over general terms in the same or another statute which might otherwise control. MacEvoy v. United States, 322 U.S. 102, 64 S. Ct. 890, 88 L. Ed. 1163; Robinson v. United States, 8 Cir., 142 F2d 431. But the purpose of this rule is to give effect to presumed intention of the law-making body. The primary rule of statutory construction requires us to ascertain and give effect to the legislative intention, Flippin v. United States, 8 Cir., 121 F2d 742; United States v. Hartwell, 73 U.S. 385, 18 L. Ed. 830 * * *".

POINT 2

In the lower Court, the Immigration and Naturalization Service by inference conceded that this apellant is exempt from the provisions of Section 316(a) of the Immigration and Nationality Act. It was, however, seriously contended that Section 318 of the same Act (8 USC 1429; App. p. v) required appellant to show a lawful permanent entry. Since both of these Sections, 316 and 318, demand lawful admission for permanent residence as a prerequisite to naturalization, appellant should not be found exempt from the requirements of one and barred by the identical language in the other without careful analysis of the text and motivating purpose of the statute said to prohibit his admission to citizenship.

Proper approach to this task was aptly and succinctly described by the Supreme Court in *Brown v. Duchesne,* 19 How. 183, 15 L. Ed. 595:

> "It is well settled that, in interpreting a statute, the court will not look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute (or statutes on the same subject) and the objects and policy of the law, as indicated by its various provisions, and give to it such a construction as will carry into execution the will of the Legislature, as thus ascertained, according to its true intent and meaning."

Section 318 reads, in part, as follows:

> "Except as otherwise provided in this title, no person shall be naturalized unless he has been lawfully admitted to the United States for permanent residence in accordance with all applicable provisions of this Act. * * * Notwithstanding the provisions of section 405(b), and except as provided in sections 327 and 328 no person shall be naturalized against whom there is outstanding a final finding of deportability pursuant to a warrant of arrest issued under the provisions of this or any other Act;"

Section 318, quoted in part above, at first blush prohibits the naturalization of any alien not lawfully admitted for permanent residence, *except as otherwise provided.* (Emphasis supplied.) Further along in the text, the section prohibits the naturalization of any alien against whom there is outstanding a final finding of deportability *"except as provided in sections 327 and 328".* (Emphasis supplied.) Neither section

327 nor section 328 contains language dealing with the naturalization of an alien under deportation proceedings or against whom there is a final finding of deportability. In the text of neither section is there reference to exempting otherwise eligible citizenship applicants from the requirements of section 318, nor indeed is section 318 mentioned.

Since no specific and direct exemption appears, it must be inferred. In addition, the phrase—"except as provided", can have but one meaning, i.e., sections 327 and 328 contain a proviso exempting them from the provisions of Section 318, not in part but in toto.

This position finds further support in simple logic. The text of Sections 327 and 328 both contain provisions exempting aliens from the requirements of Section 316(a), which as previously noted embraces a requirement of admission for permanent residence. Section 318 provided specific authority to admit to citizenship an alien having the prerequisite military service, despite the fact that he may have been found subject to deportation. See *Application of Chin King,* 124 F. Supp. 911, 912; *In re Petition of Yow Leslie Chung,* 199 F. Supp. 566, 567. An alien can not be a lawful permanent resident of the United States and at the same time be the subject of a final finding of deportability. A final finding of deportability must necessarily be substantiated by a determination that the alien is illegally in the United States. We submit that these exempting phrases stand as authority to admit this alien to citizenship under Section 328. No other view is consonant with the unmistakable intent of Congress.

POINT 3

Beyond any doubt, the Immigration and Naturalization Service would not interpose any objection to the naturalization of this appellant if his application were being considered under the provisions of Section 324 of the Nationality Act of 1940. The Courts and the Immigration and Naturalization Service ruled on numerous occasions that an alien who filed a petition for naturalization under Section 324 of the Nationality Act of 1940 was not required to perform such service subsequent to a lawful entry into the United States.

The District Court for the Western District of New York states in *In re Fleischmann,* 49 F. Supp. 223, at page 224:

> "(1) It appears palpable that such 'residence' in Section 324(c) only calls for such residence as may be verified and proved in the same manner as under Section 309, supra. It would do violence to the clear intent of both Section 324 and Section 325 to hold that only 'legal residence' was considered in Section 324(c). If 'legal residence' was intended in Section 324(c), then there would be no point in exempting the petitioner from a certificate of arrival except to save him a fee therefor. These sections were intended to relieve similarly situated petitioners of proof of ordinary legal residential requirements of which the pursuit of their calling made difficult. Then, in Section 324(d) and its counterpart under Section 325, where the termination of such service has been more than six months preceding the date of filing the petition, compliance with the requirements of Section 309 is mandatory."

A similar ruling was reached in the case of *Petition of Gislason,* 47 F. Supp. 46.

This point was considered by the Court of Appeals for the Ninth Circuit in the case of *Yuen Jung v. Barber,* 184 F.2d 491. In a footnote at the bottom of page 497, the Court stated:

> "12. We have considered the question, not argued here, whether the order must be affirmed because of petitioner's original illegal entry. But since the requirement of lawful entry in the ordinary case, is based upon the statutory requirement of continuous residence. United States v. Kreticos, 59 App. D.C. 305, 40 F2d 1020, we have concluded that since section 724a not only dispenses with certificates of arrival but expressly provides that 'no period of residence within the United States * * * shall be required', lawful entry is not a condition to naturalization under this section."

Let us compare the language of Section 324 of the Nationality Act of 1940 (8 USC 724) with the language of Section 328 of the Immigration and Nationality Act of 1952 (8 USC 1439). The pertinent parts of these two sections are set forth in the appendix at pages i-iv.

The Court is requested to take judicial notice of the fact that any petitioner for naturalization, whether he files under the veteran provisions or general provisions of the Immigration and Nationality Act, is no longer required to comply in all respects with the provisions mentioned in subparagraphs (b)(1) and (b)(2) of Section 324 of the Nationality Act of 1940.

Both of such requirements have been eliminated from the provisions of the new Act. A close examination of the language of these two sections from different Acts will show that they are substantially identical. Since there was no material change in the language of subparagraph (a) of the two sections, the earlier judicial and administrative determinations are entitled to great weight.

If the appellant was entitled to naturalization under Section 324 of the old Act, he is entitled to naturalization under similar language contained in the new Act. It must be presumed that at the time of Congressional reenactment of the provisions of Section 324 of the Nationality Act of 1940 in substantially the same language in Section 328 of the Immigration and Nationality Act of 1952, Congress had full knowledge and information as to the judicial and executive decisions with respect to such prior existing legislation. Since Congress did not explicitly declare, or by implication indicate, an intention to change the provisions of that section, it must be concluded that the prior interpretations are controlling here.

It is asserted that under the judicial precedents heretofore cited that this appellant is entitled to admission to United States citizenship at this time for the reasons heretofore set forth.

POINT 4

In order to protect the appellant's interests, it is deemed advisable to discuss the legislative history re-

lating to this particular section of the Immigration and Nationality Act of 1952.

After approximately three years of intensive and searching investigation, as well as an exhaustive study, Congress on June 27, 1952 passed H.R. 5678, the so-called McCarran-Walter Act. The exhaustive investigation and study was incorporated into a voluminous report (S. Rep. 1515, 81st Congress, 2nd Session) which contains certain basic findings and suggestions of the Committee. Upon conclusion of that study, S. 3455 was introduced by Senator McCarran in the 81st Congress—no action was taken. In the 82nd Congress, S. 716, introduced by Senator McCarran, and H.R. 2379, introduced by Mr. Walter, were presented to the respective two Houses of Congress for their consideration. Following a number of hearings and numerous conferences conducted on the proposed legislation, two modified versions were introduced: S. 2055 by Senator McCarran, and H.R. 5678 by Mr. Walter. It was the modified version introduced by Mr. Walter which was finally adopted and passed by Congress as the Immigration and Nationality Act of 1952.

Where the statutory language of an Act is not plain or where ambiguity exists, the Courts may look to the legislative history for further evidence of the legislative intent in order to determine the policy of the legislation as a whole.

Chatwin v. U. S., 326 U.S. 455, 464;

U.S. v. Rosenblum Truck Lines, 315 U.S. 50, 55.

The Congressional debates shed no light on this pertinent provision of the Immigration and Nationality Act. In the exhaustive study prepared by the Committee on the Judiciary of the United States Senate, Report No. 1515, 81st Congress, 2nd Session, there is a limited explanatory comment pertaining to this provision. At page 703, et seq., when discussing naturalization—special classes—under the subparagraph pertaining to armed service personnel, the following appears:

> "At the present time section 324 of the act provides that a person who has served honorably at any time in the Army, Navy, Marine Corps or Coast Guard for 3 years and who, if separated from the service, has been honorably discharged, may be naturalized upon petition while in the service or within 6 months after termination of his service. No declaration of intention, certificate of arrival, or residence within the court's jurisdiction is required, but with these exceptions the other requirements to naturalization, including racial eligibility, must be complied with. If the alien is in the service at the time of naturalization he may be naturalized immediately by appearing before a representative of the Immigration and Naturalization Service, accompanied by two citizen witnesses. If, however, he files for naturalization more than 6 months after completion of his honorable service, he must comply with the general residence requirements of the act—that is, 5 years' continuous residence in the United States and 6 months in the state—but his service in the armed forces, wherever it has occurred, is to be considered as residence within the United States and the State."

Subsequently, the Committee at page 709, et seq., stated:

> "G. Conclusions and Recommendations.
>
> * * * * * * *
>
> Residence
>
> The subcommittee considers and finds that one of the weak spots in our naturalization law is the lack of uniformity in residence requirements for naturalization. While recognizing the various reasons which prompted enactment of the exceptions to the 5-year residence requirement, the subcommittee feels that the requirement should be made uniform and accordingly recommends:
>
> * * * * * * *
>
> (c) Persons who serve honorably in the armed forces or Coast Guard for 3 years. This class of persons may be naturalized under Section 324 of the present act after 3 years' service, and the subcommittee recommends that this privilege be preserved in the proposed law."

House Report No. 1365, 82nd Congress, 2nd Session, (U.S. Code, Congressional and Administrative News, 1952, Vol. II, page 1737)—with respect to Section 328, contains the following:

> "* * * This provision in Section 328 of this bill carries forward substantially the provisions of existing law in Section 324 of the Nationality Act of 1940."

The foregoing excerpts, indicating the Congressional intent to carry forward the basic principles of Section 324 of the Nationality Act of 1940, clearly indicate the admissibility of this alien to United States citi-

zenship at this time under the judicial precedents heretofore cited.

Attention is also invited to the Act of June 30, 1950 (64 Stat. 316, amended June 27, 1952), which specifically provided that any alien enlisted or reenlisted *overseas* in the armed forces of the United States was eligible for expeditious naturalization after completion of five or more years of military service, if honorably discharged therefrom and without regard to any admission to the United States. At the time this appellant filed his formal petition for naturalization he had completed approximately four and one-half years of honorable military service within the meaning of Section 328 following induction under the selective service laws. The lower Court's decision denies naturalization to one inducted into the armed forces of the United States while in the United States and, at the same time, the above-cited law specifically provides that one who was enlisted abroad is entitled to this benefit. The incongruity of this position further supports appellant's contention that Congress intended to include aliens such as appellant within the purview of Section 328.

CONCLUSIONS

The right of Congress to prescribe the scope of examination for those who seek the privilege of naturalization is without doubt. The appellant has performed a service or duty that Congress saw fit to reward with special benefits. Since the appellant has

met those qualifications, how can it be said that he is not eligible to that which Congress says he is entitled? The privilege of United States citizenship is cherished by all mankind, and a denial of that privilege—when all of the essential prerequisites have been met, is contrary to all of the legal concepts that form the foundation of our government.

Wherefore, appellant prays that the decision of the District Court be reversed and that he be admitted to United States citizenship.

Dated, San Francisco, California,
November 18, 1963.

Respectfully submitted,
JACKSON & HERTOGS,
By JOSEPH S. HERTOGS,
Attorneys for Appellant.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

JOSEPH S. HERTOGS,
Attorney for Appellant.

(Appendix Follows)

Appendix.

Appendix

The language of Section 324 of the Nationality Act of 1940 (8 USC 724), and the language of Section 328 of the Immigration and Nationality Act of 1952 (8 USC 1439) for comparison purposes are set forth in adjacent columns below:

Immigration and Nationality Act of 1952, Section 328 (8 U.S.C.A. 1439).	Nationality Act of 1940, Section 324 (8 U.S.C.A. 724).
"(a) A person who has served honorably at any time in the armed forces of the United States for a period or periods aggregating three years, and, who, if separated from such service, was never separated except under honorable conditions, may be naturalized without having resided continuously immediately preceding the date of filing such person's petition, in the United States for at least five years, and in the State in which the petition for naturalization is filed for at least six months, and without having been physically present in the United States for any specified period if such petition is filed while the petitioner is still in the service or within six months after the termination of such service.	"(a) A person, including a native-born Filipino, who has served honorably at any time in the United States Army, Navy, Marine Corps, or Coast Guard for a period or periods aggregating three years and who, if separated from such service, was separated under honorable conditions may be naturalized without having resided, continuously immediately preceding the date of filing such person's petition, in the United States for at least five years and in the State in which the petition for naturalization is filed for at least six months, if such petition is filed while the petitioner is still in the Service or within six months after the termination of such service.

Immigration and Nationality Act of 1952, Section 328 (8 U.S.C.A. 1439).

EXCEPTIONS.

(b) A person filing a petition under subsection (a) of this section shall comply in all other respects with the requirements of this subchapter, except that—

(1) no residence within the jurisdiction of the court shall be required;

(2) notwithstanding section 1447(c) of this title, such petitioner may be naturalized immediately if the petitioner be then actually in the Armed Forces of the United States, and if prior to the filing of the petition, the petitioner and the witnesses shall have appeared before and been examined by a representative of the Service;

(3) the petitioner shall furnish to the Attorney General, prior to the final hearing upon his petition, a certified statement from the proper executive department for each period of his service upon which he relies for the benefits of this section, clearly showing that such service was honorable and that no discharges from service, including periods of service not relied upon by him for the benefits of this section, were other than honorable. The certificate or certificates herein provided for shall be conclusive evidence of such service and discharge.

Nationality Act of 1940, Section 324 (8 U.S.C.A. 724).

(b) A person filing a petition under subsection (a) of this section shall comply in all respects with the requirements of this subchapter except that—

(1) No declaration of intention shall be required;

(2) No certificate of arrival shall be required;

(3) No residence within the jurisdiction of the court shall be required;

(4) Such petitioner may be naturalized immediately if the petitioner be then actually in any of the services prescribed in subsection (a) of this section, and if, before filing the petition for naturalization, such petitioner and at least two verifying witnesses to the petition, who shall be citizens of the United States and who shall identify petitioner as the person who rendered the service upon which the petition is based, have appeared before and been examined by a representative of the Service.

Immigration and Nationality Act of 1952, Section 328 (8 U.S.C.A. 1439).

WHEN SERVICE NOT CONTINUOUS.

(c) In the case such petitioner's service not continuous, the petitioner's residence in the United States and State, good moral character, attachment to the principles of the Constitution of the United States, and favorable disposition toward the good order and happiness of the United States, during any period within five years immediately preceding the date of filing such petition between the periods of petitioner's service in the Armed Forces, shall be alleged in the petition filed under the provisions of subsection (a) of this section, and proved at the final hearing thereon. Such allegation and proof shall also be made as to any period between the termination of petitioner's service and the filing of the petition for naturalization.

Nationality Act of 1940, Section 324 (8 U.S.C.A. 724).

(c) In case such petitioner's service was not continuous, petitioner's residence in the United States and State, good moral character, attachment to the principles of the Constitution of the United States, and favorable disposition toward the good order and happiness of the United States, during any period within five years immediately preceding the date of filing said petition between the periods of petitioner's service in the United States Army, Navy, Marine Corps, or Coast Guard, shall be verified in the petition filed under the provisions of subsection (a) of this section, and proved at the final hearing thereon by witnesses, citizens of the United States, in the same manner as required by Section 709. Such verification and proof shall also be made as to any period between the termination of petitioner's service and the filing of the petition for naturalization.

Immigration and Nationality Act of 1952, Section 328 (8 U.S.C.A. 1439).	Nationality Act of 1940, Section 324 (8 U.S.C.A. 724).
RESIDENCE REQUIREMENT. (d) The petitioner shall comply with the requirements of section 1427(a) of this title, if the termination of such service has been more than six months preceding the date of filing the petition for naturalization, except that such service within five years immediately preceding the date of filing such petition shall be considered as residence and physical presence within the United States	(d) The petitioner shall comply with the requirements of section 709 as to continuous residence in the United States for at least five years and in the State in which the petition is filed for at least six months, immediately preceding the date of filing the petition, if the termination of such service has been more than six months preceding the date of filing the petition for naturalization, except that such service shall be considered as residence within the United States or the State.
MORAL CHARACTER. (e) * * *"	(e) * * *"

NOTE

The Immigration and Nationality Act of 1952 eliminated filing of a Declaration of Intention of a Certificate of Arrival in all cases. Thus, the provisions mentioned in subparagraphs (b)(1) and (b)(2) of Section 324 of the Nationality Act of 1940, set forth above, are no longer required.

Section 316 of the Immigration and Nationality Act (8 U.S.C.A. 1427):

> "(a) No person, except as otherwise provided in this title, shall be naturalized unless such petitioner, (1) immediately preceding the date of filing his petition for naturalization has resided continuously, after being lawfully admitted for

permanent residence, within the United States for at least five years and during the five years immediately preceding the date of filing his petition has been physically present therein for periods totaling at least half of that time, and who has resided within the State in which the petitioner filed the petition for at least six months, (2) has resided continuously within the United States from the date of the petition up to the time of admission to citizenship, and (3) during all of the periods referred to in this subsection has been and still is a person of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States."

Section 318 of the Immigration and Nationality Act (8 U.S.C.A. 1429):

"Except as otherwise provided in this title, no person shall be naturalized unless he has been lawfully admitted to the United States for permanent residence in accordance with all applicable provisions of this Act. * * * Notwithstanding the provisions of Section 405(b), and except as provided in sections 327 and 328 no person shall be naturalized against whom there is outstanding a final finding of deportability pursuant to a warrant of arrest issued under the provisions of this or any other Act; and no petition for naturalization shall be finally heard by a naturalization court if there is pending against the petitioner a deportation proceeding pursuant to a warrant of arrest issued under the provisions of this or any other Act: * * *."

No. 18,712

United States Court of Appeals

For the Ninth Circuit

ROBERT SING CHOW,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLEE

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Subject Index

Table of Authorities Cited

Cases

Statutes

No. 18,712

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ROBERT SING CHOW,
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Appellee.

BRIEF FOR APPELLEE

JURISDICTION

The jurisdiction of the District Court and of this Court has been properly invoked under the applicable statutes.

STATEMENT OF THE CASE

Appellant arrived at San Francisco, California, on August 23, 1950, on board the SS "President Wilson", and applied for admission to the United States under the name of Chow Sing, as a citizen. The claim to citizenship was founded upon Revised Statutes § 1993. Chow Sing claimed to be the natural son of Chow Yit Quong, who was alleged to be an American citizen. He was denied admission to the United States on said claim of citizenship by the Immigration and Naturali-

zation Service. An appeal to the Board of Immigration Appeals followed, the Board affirmed the decision denying admission.[1]

Following the action of the Board of Immigration Appeals affirming the decision of the Board of Special Inquiry, denying his claim to admission to the United States as a United States citizen, appellant filed a petition for declaratory judgment of United States citizenship under the provisions of § 503 of the Nationality Act of 1940 (8 U.S.C. 903), in the United States District Court for the Northern District of California. After trial, an adverse judgment was entered on February 19, 1953. Appellant appealed to this Court, and on August 18, 1954, a *per curiam* opinion was filed affirming the judgment of the District Court. On November 24, 1954, an opinion written by Judge Mathews of this Court was substituted for the *per curiam* opinion filed on August 18th. In this opinion, the Court specifically held that the finding of the District Court that "The person [Sing] who claims to be plaintiff Chow Sing has failed to introduce evidence

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[1]The petition of the appellant herein for naturalization was filed under the name of Robert Sing Chow, on January 5, 1962. On or about October 11, 1963, the alleged father of appellant, Chow Yit Quong, under oath admitted that his true name is Kwong Gum Wah; that he was born in Chung Shan District, China, on March 14, 1898, and was admitted to the United States as a citizen under the name of Chow Yit Quong on June 30, 1923, as the son of a United States citizen; that in fact his true father was Kwong Jung; that in truth and fact his true father was not a citizen of the United States, and was never in the United States; and that he, Kwong Gum Wah, is a citizen of China and not of the United States; that his son, the appellant herein, Kwong Chow Sing, was born in Canton City, China, on August 23, 1934.

of sufficient clarity to satisfy or convince this Court that Chow Yit Quong is the natural blood father of the person known as Chow Sing, or that the person [Sing] who appeared before the Court claiming to be plaintiff Chow Sing is in truth and fact Chow Sing.", was not clearly erroneous.

A petition for rehearing was thereafter filed, relying upon the decision of this Court in *Ly Shew v. Dulles,* 219 F.2d 413. By Order dated January 17, 1955, the November 24, 1954 opinion was amended; the judgment of the District Court was vacated, and the cause was remanded with directions to make findings as to whether Chow Yit Quong was "Sing's father, in the light of the opinion. This remand was founded on the proposition that the District Court had proceeded on the theory that the burden of proof resting on Sing was different from and heavier than the ordinary burden of proof resting on plaintiffs in civil actions. Upon the remand, the District Court, after further proceedings in accordance therewith, on April 1, 1955 again denied to appellant the relief prayed for in the petition for declaratory judgment. This judgment was also appealed, and on June 25, 1956 this Court filed its opinion holding that Chow Sing had not carried his burden of proof, and affirmed the judgment of the District Court. Appellant did not seek certiorari in the Supreme Court, so the decision of the Board of Special Inquiry denying admission to the United States was final.

As recited in appellant's brief, the appellant was inducted into the United States Army and served

honorably in an active-duty status from August 1, 1957 to July 31, 1959, at which time he was transferred to the Army Reserves. The petition for naturalization filed in the District Court was denied on the ground that appellant failed to establish lawful admission to the United States for permanent residence.

QUESTION PRESENTED

The question presented is: Must appellant establish that he was lawfully admitted to the United States for permanent residence under Section 328 of the Immigration and Nationality Act of 1952?

SUMMARY OF THE ARGUMENT

It is appellee's contention that to be accorded the benefits of § 328 (naturalization through service in the armed forces of the United States) the petitioner must have been lawfully admitted to the United States for permanent residence.

ARGUMENT

Section 328(a) (8 U.S.C. 1439) provides that

> "a person who has served honorably at any time in the armed forces of the United States for a period or periods aggregating three years, and who, if separated from such service, was never separated except under honorable conditions, may

be naturalized without having resided continuously immediately preceding the date of filing such person's petition, in the United States for at least five years, and in the State in which the petition for naturalization is filed for at least six months, and without having been physically present in the United States for any specified period".

This portion of the section eliminates the necessity of

"having resided continuously * * * in the United States for at least five years, and in the State * * * for at least six months * * * and without having been physically present in the United States * * * if such petition is filed while the petitioner is still in the service or within six months after the termination of such service".

Section 328(b) provides:

"A person filing a petition under subsection (a) of this section shall comply in all other respects with the requirements of this title * * *",

with exceptions not pertinent to the argument.

Subdivision (d) of said section provides:

"The petitioner shall comply with the requirements of section 316(a) of this title, if the termination of such service has been more than six months preceding the date of filing the petition for naturalization * * *".

Section 316(a) provides:

"No person, except as otherwise provided in this title, shall be naturalized unless such peti-

> tioner (1) immediately preceding the date of filing his petition for naturalization has resided continuously, after being *lawfully admitted for permanent residence,* within the United States for at least five years and during the five years immediately preceding the date of filing his petition has been physically present therein for periods totaling at least half of that time, and who has resided within the State in which the petitioner filed the petition for at least six months, (2) has resided continuously within the United States from the date of the petition up to the time of admission to citizenship, and (3) during all the periods referred to in this subsection has been and still is a person of good moral character * * *". [Emphasis supplied.]

Subsection (a) of § 316 contains three separate parts. (1) continuous residence after being lawfully admitted for permanent residence within the United States for five years, and within the State for at least six months, having been physically present therein for at least half of that time; (2) continuous residence from the date of the petition to the time of admission; and (3) during all the period has been and still is a person of good moral character. Subdivision (a) of § 328 specifically eliminates the residence and physical presence requirements, if the petition is filed while the petitioner is still in the service, or within six months after the termination of such service. In no wise has the requirement "after having been lawfully admitted for permanent residence" been eliminated or excused.

Section 318 provides:

> "Except as otherwise provided in this title, no person shall be naturalized unless he has been lawfully admitted to the United States for permanent residence in accordance with all applicable provisions of this Act."

The decisions that have considered Section 328 have all stated that Section 328 requires the alien to have been admitted to this country for permanent residence. *United States v. Rosner,* 249 F.2d 49, involved a question as to whether or not under § 328(a) the words

> "served honorably at any time in the armed forces of the United States for a period or periods aggregating three years",

were to be construed as requiring the individual to have "active duty status" or whether or not service in the Army Reserve could be included in determining the period of service. The Court of Appeals for the First Circuit compared § 328 with § 329 (8 U.S.C. 1440) and held that the Congress having specified in § 329 that

> "any person who while an alien or non-citizen national of the United States has served honorably in an *active duty status* * * *, as compared with the requirements of §328(a) 'a person who has *served honorably* at any time in the armed forces' meant that the words 'served honorably' did not require such service to be in an active duty status."

The Court said, at page 51,

> "It seems likely that Congress, if it had meant the words 'served honorably' in Sec. 328 to require such service to be in an active duty status, would have inserted that requirement specifically in Sec. 328 as it has done in Sec. 329."

The Court went on further to say, on the same page,

> "Title 8 U.S.C.A. § 1440a allowed aliens coming under its provisions to be naturalized even though they were not admitted for permanent residence, providing they had been lawfully admitted and had been physically present within the United States for a single period of at least one year at the time of entering the armed forces. It would not be illogical to content that Congress intended to require higher standards of military service in Sec. 329 and 8 U.S.C.A. § 1440a in return for allowing aliens who had not been lawfully admitted to the United States for permanent residence the advantage of practically immediate citizenship under the provisions of Sec. 329 and only a one year period of residence under 8 U.S.C.A. § 1440a.
>
> Sec. 328, on the other hand, requires the alien to have been admitted to this country for permanent residence. It further requires a period of three years in military service, unlike Sec. 329, which sets no minimum length on the period of time served during World War I or World War II and 8 U.S.C.A. § 1440a, which requires a period of ninety days in active military service."

The Court of Appeals for the Seventh Circuit in *United States v. Aronovici,* 289 F.2d 559, found itself

in agreement with the First Circuit in *United States v. Rosner,* supra, and quoted from said decision

> "Sec. 328, on the other hand, requires the alien to have been admitted to this country for permanent residence." (Page 561.)

The Court of Appeals for the Second Circuit, in *Papathanasiou v United States,* 289 F.2d 930, in a *Per Curiam* Order affirming the District Court, cited *United States v. Rosner,* 1 Cir., supra,

The Supreme Court of the United States, in *Tak Shan Fong v. United States,* 359 U.S. 102, 3 L.ed. 662, 79 S.Ct. 637, in considering a question concerning the commencement of presence in the country, where it appeared that a lawful entry had preceded a subsequent illegal entry, held the lawful entry preceding the subsequent illegal entry was irrelevant. Beginning on page 103, the Court said:

> "Congress has shown varying decrees of liberality in granting special naturalization rights to aliens serving in our armed forces at various times. For example, the Immigration and Nationality Act of 1952 allows such rights to those having served honorably in World War I or during the period September 1, 1939 to December 31, 1946, if at the time of their induction or enlistment they simply were physically present in the United States or certain named outlying territories (8 U.S.C. § 1440). On the other hand, that Act's general provision allowing aliens with three years' armed service at any time to be naturalized free of certain residence requirements (8 U.S.C. § 1439) provides no exemption from the requirement that they have been 'law-

> fully admitted to the United States for permanent residence' (§ 318, 8 U.S.C. § 1429.)"

Judge Carter, District Judge of the United States District Court for the Northern Division of California, in the *Petition for Naturalization of Pedro Velasco Fernandez,* 196 Fed. Supp. 107, in his opinion denying the petitioner's application for naturalization, on page 108 stated:

> "The Naturalization Examiner correctly states that Sections 328 and 329 of the Immigration and Nationality Act of 1952, 66 Stat. 249, 8 U.S.C.A. §§ 1439 and 1440 do not apply. Section 328 requires that the alien must have been lawfully admitted for permanent residence. Section 329 applies only to service in World War I or during a period beginning September 1, 1939 and ending December 31, 1946."

Appellant, in the Argument of his brief, has designated four "points". Point 1 submits the proposition that petitioner, having filed his petition when still in the service or within six months thereafter, under § 328(d) does not have to comply with any of the requirements of § 316(a), including the requirement "after being lawfully admitted for permanent residence". It is the view of the appellee that § 328(a) has specifically eliminated the portion of § 316(a) with which the petitioner does not have to comply if the petitioner has filed the petition while still in the service or within six months after termination, and that said subdivision has not eliminated the requirements of lawful admission for permanent resi-

dence; furthermore, that subdivision(b) of § 328 provides for compliance in all other respects with the requirement of the Title; and § 318 specifically states that except as otherwise provided in the Title, no person shall be naturalized unless he has been lawfully admitted. Nowhere in the Title has this requirement been "otherwise provided".

Point 2 of appellant's Argument is that in the lower court the Immigration and Naturalization Service by inference conceded that appellant is exempt from the provisions of § 316(a). It is not clear from appellant's Argument on this point just how this inference is drawn. Appellee does not concede such an inference. The specific reason for the recommendation of the naturalization examiners that the petition be denied was that appellant had not been lawfully admitted for permanent residence.

Point 3 of appellant's Argument is considered to be wholly irrelevant, as to whether or not the Immigration and Naturalization Service would have interposed any objection to the naturalization of appellant if his application were being considered under the provisions of § 324 of the 1940 Nationality Act. The specific point here is that [under the provisions of the 1952 Act] the Immigration and Naturalization Service did interpose objection to the granting of the naturalization petition under the provisions of § 328, on the grounds that appellant was not lawfully admitted for permanent residence.

Point 4 of the appellant's Argument is also concerned with the provisions of § 324 of the Nationality

Act of 1940. Appellant deemed it advisable to discuss certain portions of the legislative history relating to the section. With regard to the legislative history, reference is again made to the Supreme Court's decision in *Tak Shan Fong v. United States,* supra, beginning on page 104:

> "As distinguished from its policy toward World War I and II service, Congress was not prepared to allow special naturalization rights to aliens serving at the time of Korea simply if they entered the service while physically, for any length of time and lawfully or unlawfully, within the United States. Nor was it prepared to make one year's residence alone the condition; it also imposed the requirement of lawful admittance. It would not be a meaningful requirement to attribute to Congress if it could have been satisfied by a lawful entry, followed by departure, before and unconnected with the commencement of the year's presence. We believe that Congress must have been referring to the last entry before the year's presence—the entry into the country which provided the occasion for that presence. Cf. *Bonetti v. Rogers,* 356 U.S. 691. Under this construction, clause (2) of the statute requires a 'single period' of residence commencing with lawful admission and continuing for a year thereafter. It does not demand that the alien's continuing status in the country be lawful, but it does make that requirement of the entry which gives rise to his presence.
>
> "Such legislative history as is relevant to the meaning of the statute bears out this construction. The Act was passed in the First Session of the Eighty-third Congress, and when the bill that

became the Act was first brought to the House floor after Committee consideration during that Session, the member reporting it stated that it was identified with the law that existed during 'the war' (presumably World War II) with the exception that it applied only to aliens who were 'legally and lawfully in the United States'. 99 Cong Rec 2639. This must be read in the context of the House Committee Report's statement that 'lawful admission' was a prerequisite to the bill's benefits, and its explanation that it had rejected a proposal of the Justice Department that would have required the presence of the alien at the time of entrance into the armed services also be lawful. The Committee had felt that the alien should not be saddled with 'the technicalities involved in connection with the continuance of such [lawful] status at the time of entering the Armed Forces'. HR Rep No. 223, 83d Cong. 1st Sess, p. 4. The House bill required only lawful admission and physical presence at the time of entering the service; later the Senate inserted the one year's presence requirement, but we do not perceive any change in the distinction we have set forth above. To us, this indicates that Congress desired that the alien's presence in the country be the consequence of a lawful admission, even though the continuance of his stay be beyond the terms on which he was admitted.''

Assuming appellant's contention that Congress intended to carry forward the basic principles of Section 324, the principles involved are those related to residence as embodied in Section 328. There is no

basis for a conclusion that lawful admission for permanent residence is other than a specific requirement.

CONCLUSION

It is respectfully submitted that the District Court did not err in denying appellant's petition for naturalization on the grounds that he had not been lawfully admitted for permanent residence; and the judgment of said Court should be affirmed.

Dated, San Francisco, California,
January 4, 1964.

CECIL F. POOLE,
United States Attorney,
CHARLES ELMER COLLETT,
Assistant United States Attorney,
Attorneys for Appellee.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

CHARLES ELMER COLLETT,
Assistant United States Attorney,
Attorney for Appellee.

(Appendix Follows)

Appendix.

Appendix

Section 316, Immigration and Nationality Act of 1952 (8 U.S.C. 1427):

Subdivision (a):

"No person except as otherwise provided in this title, shall be naturalized unless such petitioner (1) immediately preceding the date of filing his petition for naturalization has resided continuously, after being lawfully admitted for permanent residence, within the United States for at least five years and during the five years immediately preceding the date of filing his petition has been physically present therein for periods totaling at least half of that time, and who has resided within the State in which the petitioner filed the petition for at least six months, (2) has resided continuously within the United States from the date of the petition up to the time of admission to citizenship, and (3) during all the periods referred to in this subsection has been and still is a person of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States."

Section 318, Immigration and Nationality Act of 1952 (8 U.S.C. 1429):

"Except as otherwise provided in this title, no person shall be naturalized unless he has been lawfully admitted to the United States for permanent residence in accordance with all applicable provisions

of this Act. The burden of proof shall be upon such person to show that he entered the United States lawfully, and the time, place, and manner of such entry into the United States, but in presenting each proof he shall be entitled to the production of his immigrant visa, if any, or of other entry document, if any, and of any other documents and records, not considered by the Attorney General to be confidential, pertaining to such entry, in the custody of the Service. Notwithstanding the provisions of section 405 (b), and except as provided in sections 327 and 328 no person shall be naturalized against whom there is outstanding a final finding of deportability pursuant to a warrant of arrest issued under the provisions of this or any other Act; and no petition for naturalization shall be finally heard by a naturalization court if there is pending against the petitioner a deportation proceeding pursuant to a warrant of arrest issued under the provisions of this or any other Act: *Provided,* That the findings of the Attorney General in terminating deportation proceedings or in suspending the deportation of an alien pursuant to the provisions of this Act, shall not be deemed binding in any way upon the naturalization court with respect to the question of whether such person has established his eligibility for naturalization as required by this title."

Section 328, Immigration and Nationality Act of 1952 (8 U.S.C. 1439):

"(a) A person who has served honorably at any time in the Armed Forces of the United States for a

period or periods aggregating three years, and who, if separated from such service, was never separated except under honorable conditions, may be naturalized without having resided, continuously immediately preceding the date of filing such person's petition, in the United States for at least five years, and in the State in which the petition for naturalization is filed for at least six months, and without having been physically present in the United States for any specified period, if such petition is filed while the petitioner is still in the service or within six months after the termination of such service.

"(b) A person filing a petition under subsection (a) of this section shall comply in all other respects with the requirements of this title, except that—

(1) no residence within the jurisdiction of the court shall be required;

(2) notwithstanding section 336(c), such petitioner may be naturalized immediately if the petitioner be then actually in the Armed Forces of the United States, and if prior to the filing of the petition, the petitioner and the witnesses shall have appeared before and been examined by a representative of the Service;

(3) the petitioner shall furnish to the Attorney General, prior to the final hearing upon his petition, a certified statement from the proper executive department for each period of his service upon which he relies for the benefits of this section, clearly showing that such service was

honorable and that no discharges from service, including periods of service not relied upon by him for the benefits of this section, were other than honorable. The certificate or certificates herein provided for shall be conclusive evidence of such service and discharge.

(c) In the case such petitioner's service was not continuous, the petitioner's residence in the United States and State, good moral character, attachment to the principles of the Constitution of United States, and favorable disposition toward the good order and happiness of the United States, during any period within five years immediately preceding the date of filing such petition between the periods of petitioner's service in the Armed Forces, shall be alleged in the petition filed under the provisions of subsection (a) of this section, and proved at the final hearing thereon. Such allegation and proof shall also be made as to any period between the termination of petitioner's service and the filing of the petition for naturalization.

(d) The petitioner shall comply with the requirements of section 316(a) of this title, if the termination of such service has been more than six months preceding the date of filing the petition for naturalization, except that such service within five years immediately preceding the date of filing such petition shall be considered as residence and physical presence within the United States.

(e) Any such period or periods of service under honorable conditions, and good moral character, at-

tachment to the principles of the Constitution of the United States, and favorable disposition toward the good order and happiness of the United States, during such service, shall be proved by duly authenticated copies of the records of the executive departments having custody of the records of such service, and such authenticated copies of records shall be accepted in lieu of compliance with the provisions of section 316(a).

Section 329, Immigration and Nationality Act of 1952 (8 U.S.C. 1440):

"(a) Any person who, while an alien or a noncitizen national of the United States, has served honorably in an active-duty status in the military, air, or naval forces of the United States during either World War I or during a period beginning September 1, 1939, and ending December 31, 1946, or during a period beginning June 25, 1950, and ending July 1, 1955, and who, if separated from such service, was separated under honorable conditions, may be naturalized as provided in this section if (1) at the time of enlistment or induction such person shall have been in the United States, the Canal Zone, American Samoa, or Swains Island, whether or not he has been lawfully admitted to the United States for permanent residence, or (2) at any time subsequent to enlistment or induction such person shall have been lawfully admitted to the United States for permanent residence. The executive department under which such person served shall deter-

mine whether persons have served honorably in an active-duty status, and whether separation from such service was under honorable conditions: *Provided, however,* That no person who is or has been separated from such service on account of alienage, or who was a conscientious objector who performed no military, air, or naval duty whatever or refused to wear the uniform, shall be regarded as having served honorably or having been separated under honorable conditions for the purpose of this section. No period of service in the Armed Forces shall be made the basis of a petition for naturalization under this section if the applicant has previously been naturalized on the basis of the same period of service.

NO. 18,713

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOSEPH C. SAN NICOLAS,
Appellant,

vs.

GOVERNMENT OF GUAM,
Appellee.

OPENING BRIEF OF APPELLANT

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Subject Index

Table of Authorities Cited

Codes

Texts

NO. 18,713

IN THE

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JURISDICTION

The jurisdiction of the appellate division of the District Court of Guam over this criminal proceeding is sustained by 48 U.S.C. Section 1424 (a) (1958 ed.) and Guam Code Civ. Proc. (1953), Section 63. The juris-

diction of this court to review the judgment of the appellate division of the District Court of Guam appealed from is sustained by 28 U.S.C. Section 1291 (1958 ed.) and 28 U.S.C. Section 1294(4) (Supp. III, 1958 ed.).

THE CASE

On March 1, 1963, appellee filed an amended information stating that appellant,

> "... on or about the 8th day of October, 1962, in the territory of Guam, at Agana Heights, ... did unlawfully and feloniously enter the Seventh Day Adventist, Far Eastern Island Mission Building with intent to commit theft, in violation of Section 459 to 461(2)

of the Penal Code of Guam."

"... on or about the 8th day of October, 1962, in the territory of Guam, at Agana Heights, ... did unlawfully and feloniously steal, take and carry away the personal property of another, to wit: $70.00, United States Currency, the property of the Seventh Day Adventist, Far Eastern Island Mission, and did then and there appropriate the same to their own use and benefit, in violation of Section 484, in relation to Section 487(1) and punished under Section 489, all of the Penal Code of Guam."

The appellant, Joseph C. San Nicolas, was apprehended by the

Guam Police Department on October 9, 1962 at about 11:55 P.M. with five (5) other persons. The said incident supposedly took place on the 8th day of October, 1962. The appellant was questioned by Police Officers from the time of his arrest until 3:55 A.M. on the 10th day of October, 1962; at which time, a Police Officer typed a written confession which the appellant signed. The confession was in stilted police language excepting for the last two sentences. The confession stated that appellant entered the Seventh Day Adventist, Far Eastern Island Mission, on the 9th day of October, 1962 after the crime had been reported for more

than 24 hours. The appellant later categorically denied this admission and confession for it was taken in the early hours of the morning after continuous questioning of the appellant who is a youth, age 18 years and 4 months. The appellant established by independent testimony, an alibi for the 8th day of October, 1962, and through the night until the 9th day of October, 1962. Further, there was no evidence by the prosecution that the appellant was seen in the vicinity of the crime before or during the day prior to its commission.

The Prosecutor's evidence did not establish that there was any money

within the Mission except by hearsay evidence of its first two witnesses who also stated that they did not see the appellant or had ever seen him at the Mission. The only corroboration of the confession by the appellant who later repudiated under oath on the witness stand that he had never been near the Seventh Day adventist, Far Eastern Island Mission building, was the testimony of an accomplice, Gulo Tenorio, which under the law of Guam is inadmissable.

The testimony of the Police Officer in charged, Lt. Taitano, stated there was no fruits of the crime and that there was no evidence of any money or silver, or anything to indicate ...

that a crime actually occurred and that no money was found in the possession of the appellant. (R., p. 97, line 11 to 16)

Nevertheless, appellant was found guilty, and judgment was entered against him on April 12, 1963.

GROUNDS RELIED UPON

The following are the errors which appellant relies:

1. The verdict was contrary to the weight of the admissable evidence. (Section 187(A) (Argument 1931 1937 24 Cal. App. 2nd 253 71 Cal. App. 2126)

It is estatlish principal of the law that a conviction cannot stand

if the prosecution introduce no evidence to support it. (Thompson v Louisville (1960) 362 US 199 4 L ed. 2nd 654 80SCt. 624 8ALR 2nd 1355) In this particular case it was held "... was not sufficiency of the evidence, but instead whether appellant's conviction rested on any evidence at all.

In the instant case there is evidence of the prosecution that was introduce to show that a crime was committed, but there was no evidence of any connection of the appellant with the alleged crime.

In Maulden v State (1937) 28Ala. App. 30, 177 SO 309), "this was established that in order to con-

vict of a crime, it is necessary that the State establish by evidence. Without evidence there can be no conviction," all of the offense charged, and that the law permits nothing by legal evidence presented before the jury to be considered in support of the charged against the accused. (United States v Schneiderman (1952) DC Cal. 106 F. Supp. 986) The confession was admitted even though it was of questionable value and unsupported.

Presumption of innocence which runs in favor of one accused of crime is one of the most familiar presumption known to the law.

"The presumption must be overcome by evidence. ... (Ft. 20 Holman v State (1952) 36 Ala. App. 474, 59 SO 2nd 620)

There is no connection of a crime when there is no evidence that a crime was committed, much less that the accused committed it or there were any fruits of the crime recovered by police. (R., p. 97, line 11 to 16)

The jury found the appellant not guilty of the offense of Grand Theft, but found the appellant, Joseph C. San Nicolas, guilty of the offense of Burglary in the Second Degree as charged in the first charge of the amended

Information. It logically follows that if the appellant establish an alibi that he was not at the scene of the crime then the jury's verdict should be not guilty of any of the two charges.

2. No proper foundation was laid for the admission of the confession. (R., p. 91, line 20)

The confession was extorted by duress and was written on a typewriter by a Police Officer at 3:55 A.M. after continuous questioning by other Police Officers. The appellant is a youth, age 18 years and 4 months, who was scared, hungry and only partly awake. (R., p. 79, line 24 to 26)

3. This appellant was convicted upon the uncorroborated testimony of

accomplices. (R., p. 63, line 16 to 20, R., p. 52, line 16 to 24)

Section 1111. Conviction on Testimony of Accomplice. Accomplice defined. A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof. An accomplice is hereby defined as one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given.

A conviction (Supp. R., p. 15 line 5 to 23) which says, "an accomplice is a person who is guilty of the same offense as the offense charged against the appellant. Now in this jurisdiction as a matter of law, he is an accomplice. In this jurisdiction, appellant may not be convicted on the uncorroborated testi-

mony of an accomplice. There was no other corroborating evidence that the appellant was at the scene of the crime either by the police or the prosecutor's first two witnesses, Lois Foster and Jane C. Flores. (20 Am. Jur. Evidence Section 222) The accused may stand on this presumption of innocence withholding all proofs until the appellee establish his complete case. (Ft. 11) (Holt v United States, 218 US 245 54 L ed. 1021, 31 SCt. 2) Presumption of innocence attends all proceedings against the accused from their initiation until they resolve in a verdict which either finds him guilty or converts the presumption of innocence into an adjudged fact. (Ft. 12) In addi-

tion, the court should have found that the witness, Jesus P. Perez, was also an accomplice as a matter of law. (R., p. 20, line 19)

4. There was no corroboration of the confession.

The appellant categorically denied being at the scene of the crime. There was no evidence that the appellant was at the scene of the crime or that he took any money from the Seventh Day Adventist, Far Eastern Island Mission. Further, the appellant denied ever being at the Seventh Day Adventist, Far Eastern Island Mission Building. (R., p. 126, line 16 to 26)

5. The jury during its deliberations had access to law books and

statutes. The jury was sent to the Law Library of the Guam Congress Building and had access to law books. Further, the jury could have been influenced by the unauthorized use of the said law books.

6. The District Court of Guam erred in not granting a dismissal at the close of the Government Case.

(R., p. 98, line 23 to 26 Guam Code Section 1096) Presumption of innocence. Reasonable doubt. A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his guilt of this presumption is only to place upon the state the burden of proving him guilty beyond a reasonable doubt. Reasonable doubt is defined as follows: "It is not a mere possible doubt; because everything

relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case, which after the entire comparison and consideration of all the evidence, leaves the mind of the Judge in that condition that he cannot say he feels an abiding conviction, to a moral certainty, of the truth of the charge."

There is a strong presumption of innocence and it is the burden of proof by the prosecution to prove beyond a reasonable doubt the charge which the appellant have been accused or it is the duty of the Judge to acquit the appellant. The remaining evidence tends to connect is not sufficient to connect the appellant with the crime as charged. Therefore, it was the

duty of the Judge to acquit the appellant, at the close of the Government Case. (Thompson v Louisville (1960) 362 US 199 4 L ed. 2nd 654 80S Sct. 624 84LR 2nd 1355)

The presumption of innocence which runs in favor of the accused of crime in the instant case should have let the court to have directed a verdict of not guilty.

7. The District Court of Guam erred in admitting hearsay evidence, improper questioning, evidence without proper foundation.

The District Court of Guam failed to properly instruct the jury with respect to the proper

corroboration of the testimony of accomplices, and the proper proof and foundation for the admission of a confession.

Evidence without proper foundation, the screwdriver and the crowbar were shown by the police to have been found on the lawn of the Seventh Day Adventist, Far Eastern Island Mission. The police were unable to show that there was any direct connection of the crowbar or the screwdriver with the burglary of the Seventh Day Adventist, Far Eastern Island Mission Building, (R., p. 16, line 12 to 18) except by evidence of accomplices. If they

had been actually used by any person it would have been reasonable that the marks on the safe could match with the metal of the crowbar or the screwdriver. (R., p. 18, line 23 to 26) There was no such showing or attempt to show that the same crowbar and screwdriver actually were involved with this crime, other than the introduction by the prosecutor.

The court should have instructed the jury that there were two accomplices and that a conviction could not be had upon the testimonies of accomplices. There was no proper foundation by the prosecution for the confession of

the appellant, Joseph C. San Nicolas.

Section 1118. When evidence on prosecution side is closed, the court may acquit. If, at any time after the evidence on the prosecution side is closed, the court deems it insufficient to warrant a conviction, it may acquit the defendant.

Section 1111. (1953 Penal Code of Guam) Conviction on testimony of accomplice. A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof. ...

The court should not have permitted the evidence of the accomplices to be put into the record. Later it attempted to issue instructions, in effect the accomplices' testimonies could

not be considered; but the jury disregarded the Judge's instructions and did convict the appellant.

The confession was entered without proper foundation as the prosecutor never layed such before requesting admission of the confession. The police said the crowbar was not identified as to the owner, (R., p. 16, line 12 to 18) and did not see appellant using crowbar. There were no marks on the safe which could (R., p. 18, line 23 to 26) be identified as same width of crowbar tip.

8. The District Court of Guam failed to properly instruct the jury with respect to the

proper corroboration of the testimony of accomplices and the proper proof and foundation for the admission of a confession.

Jesus P. Perez, one of the prosecutor's witness, was the driver of the car and owner of the screwdriver and crowbar. He was arrested, but was never brought to trial. ... one who is an accomplice means one who is liable to prosecution for the identical offense charged against the defendant. ...

ARGUMENT

1. First Point of Law, the verdict was contrary to the weight of the admissable evi-

dence.

... it is the duty of the prosecution to prove all the elements of the crime beyond a reasonable doubt...

(Page 98 Guam Code Section 1096) Presumption of innocence. Reasonable doubt. A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his guilt of this presumption is only to place upon the state the burden of proving him guilty beyond a reasonable doubt. ...

Here the prosecution failed to prove their case beyond a reasonable doubt. ..., the prosecution did attempt to show a crime was committed by pictures, exhibits 1 and 2. This is not sufficient to prove 'beyond a reasonable

doubt', which was their burden. The prosecution, then proceeded to enter exhibits 3 and 4, the crowbar and the screwdriver, but failed to connect them with the appellant except through the testimony of Jesus Perez, the owner of the tools, who stated that he was told by Galo Tenorio, (another accomplice), three days before the trial that the appellant had put the crowbar and the screwdriver in his car. (R., p. 32, line 17 to 24) This was hearsay of the evidence of an accomplice, Galo Tenorio, (R., p. 48, line 25 to 26, R., p. 49, line 2 and 3). As to the

prosecution's exhibit No. 5, there was little doubt that this confession was a stereotyped printed form by the police with an insertion of some of the words used by the appellant. This confession was false as it confessed to entering the Mission on October 9, 1962. (R., p. 91, line 20) Clearly, this was a fatal error to the entire confession, for he was in custody of the police at this time. The court gave a proper instruction that ... they should scrutinize the surrounding circumstances. ... The appellant signed this at 3:55

A.M., but later repudiated to the confession in its entirety and established that he was in Dededo Village, approximately 10 miles from the alleged scene of the crime. The prosecution failed to show any connection by the first two witnesses with the appellant or that he was ever present on the grounds or in the building of the Seventh Day Adventist Mission.

The confession was partly false as it did not confess to a crime on the date alleged by the prosecution.

"... Confession is an admission by a defendant of all facts constituting the crime

charged. The very nature of a confession requires the circumstances surrounding it be subject to careful scrutiny... (or) that "for some threat of harm or some offer of promise of unscrutiny... such confession should not be considered". ...

Here the prosecution failed to connect the appellant with the crime and then attempted to use the evidence of the accomplice to corroborate the very same testimony that the accomplice had given, this violates the intent of the legislature in enacting Section 1111 in that such

corroboration must be by "some other evidence as shall tend to connect the defendant with the commission of the offense". ...

This element of the alleged crime must, of course, be proven beyond a reasonable doubt.

"... The prosecution is required to prove beyond a reasonable doubt--that is, to a moral certainty--every fact or element of the crime charged, each independent fact necessary to the chain of circumstances to show... the guilt of the accused. ..." (18 Cal. Jur. 2d, Evidence

Section 112 (emphasis added)
(Footnotes omitted).

". . . . .

"No adjudication by the court of the status of the only evidence offered by the prosecutor upon the trial tending to prove burglary in the second degree was the confession by the appellant which was typed by a Police Officer and signed by the appellant after continuous questioning by Police Officers. And as that confession was not based upon proof beyond a reasonable doubt, one of the elements of the crime alleged (The confession of Joseph C.

San Nicolas) was not proven beyond a reasonable doubt. Therefore, the trial court erred in denying appellant's motion for entry of judgment of acquittal and in entering judgment against appellant.

Respectfully submitted,

PALTING & GROVER,

By G. WILBERT GROVER,

Attorneys for Appellant.

CERTIFICATION

I certify that in connection with the preparation of this brief I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

G. WILBERT GROVER.

(Appendix Follows)

Appendix.

Appendix

STATUTE AND RULE CITED

"The courts of appeals shall have jurisdiction of appeals from all final decisions of . . . the District Court of Guam ...." 28 U.S.C. Section 1291 (1958 ed.).

" Appeals from reviewable decisions of the . . . territorial courts shall be taken to the courts of appeals as follows:

". . . . .

"(4) From the District Court of Guam, to the Court of Appeals for the Ninth Circuit." 28 U.S.C. Section 1294 (Supp. III, 1958 ed.).

". . . The District Court of

Guam . . . shall have such appellate jurisdiction as the legislature may determine . . . ." 48 U. S.C. Section 1424(a) (1958 ed.).

"When used in this title, unless the context otherwise requires:

"(a) 'Court' means District Court.

"(b) 'Judge' means judge of the District Court.

"(c) 'Confession' means an admission by a defendant of all facts constituting the crime charged.

"(d) 'Accomplice' means one who is liable to prosecution for the identical offense charged against the defendant. ...

"(e) The singular includes the plural, the plural the singular, and the masculine the feminine, when consistent with the intent of this act." Guam Code Civ. Proc. (1962 Cum. Pocket Supp.), Section 251.

"Motion for judgment of Acquittal. The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's

motion for judgment of acquittal at the close of the evidence offered by the government is not granted, the defendant may offer evidence without having reserved the right.

EXHIBITS

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 18714

JAIME J. MERINO,

Petitioner-Appellant,

vs.

UNITED STATES MARSHAL,

Respondent.

Appeal From an Order Dismissing a
Writ of Habeas Corpus in the
United States District Court for the
Southern District of California
Central Division

APPELLANT'S OPENING BRIEF

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SUBJECT INDEX

TABLE OF AUTHORITIES CITED

CASES

TABLE OF AUTHORITIES CITED (Continued)

Page

CASES

TABLE OF AUTHORITIES CITED (Continued)

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 18714

JAIME J. MERINO,

Petitioner-Appellant,

vs.

UNITED STATES MARSHAL,

Respondent.

APPELLANT'S OPENING BRIEF

I.

STATEMENT OF JURISDICTION

The instant appeal is taken from an Order Dismissing a Writ of Habeas Corpus entered in the United States District Court for the Southern District of California. Said petition for writ of Habeas Corpus was filed in the District Court after an adverse decision before United States Commissioner Theodore Hocke. Commissioner Hocke found that appellant should be surrendered to officials of the Republic of Mexico for extradition. The Commissioner had jurisdiction to hear the cause pursuant to Commissioner's Order of Appointment dated February 28, 1959 and pursuant to the provisions of Title 18, United States Code Section 3184 and the Treaty of Extradition between the United States of America and the United States of Mexico concluded February 22, 1899 (31 Stat. 1818) modified by a supplemental

convention effective July 11, 1926 (44 Stat. 2409) and again modified by a supplemental convention effective April 14, 1941 (55 Stat. 1133)).

The District Court had jurisdiction to entertain appellant's application for a writ of habeas corpus and to grant the same pursuant to the provisions of Title 28, United States Code Section 2241. This Court has jurisdiction to consider the instant appeal pursuant to the provisions of Title 28, United States Code, Section 2253.

II.

STATEMENT OF THE CASE

References to the Clerk's Transcript are hereinafter referred to by the abbreviation Clk's Tr. References to the Reporter's Transcript of the proceedings before the United States Commissioner, said transcript comprising nine volumes, will be referred to hereinafter by the abbreviation Tr. Reference to the exhibits which were filed before the United States Commissioner and subsequently received and considered by Judge Stephens, will hereinafter be referred to by the abbreviation Ex.

On February 1, 1960, an extradition complaint was filed before United States Commissioner Hocke (Clk's Tr. 2). On April 12, 1960 an amended extradition complaint was filed with the Commissioner (Clk's Tr. 5). A hearing on the amended extradition complaint was commenced on Tuesday, May 24, 1960 (Tr. 5); continued on various subsequent dates (Tr. vols. 2 through 9) and the hearing concluded on July 20, 1960 (Tr. vol. 9). Prior to the commencement of the hearing before Commissioner Hocke, namely on April 25, 1960, appellant filed a

Motion to Take Depositions (Clk's Tr. 11) supported by Affidavit (Clk's Tr. 12). The appellant's application to take Depositions was denied by the Commissioner on May 26, 1960, and after the conclusion of the hearing,the Commissioner found appellant extraditable and issued a final commitment on June 12, 1961 (Clk's Tr. 9). On June 21, 1961 appellant filed a Petition for Writ of Habeas Corpus in the United States District Court, Southern District of California (Clk's Tr. 2). On July 10, 1961 the government filed a return to the order to show cause (Clk's Tr. 6). Subsequently, by stipulation filed December 14, 1962, it was stipulated that the Order to Show Cause issued by the District Court be deemed a granting of the Application for Writ of Habeas Corpus and the return to the Order to Show Cause be deemed a return to the Writ of Habeas Corpus and that the Traverse to the Return to the Order To Show Cause be deemed a Traverse to the Return To the Writ of Habeas Corpus (Clk's Tr. 80).

On December 14, 1962, the District Court ordered that all exhibits and the transcript of proceedings held before the United States Commissioner be received in evidence in the habeas corpus hearing. (Clk's Tr. 84). On April 3, 1963, an Order Dismissing Writ of Habeas Corpus was filed and entered (Clk's Tr. 85). A timely Notice of Appeal was filed on April 11, 1963 (Clk's Tr. 92).

III.

SPECIFICATION OF ERRORS

1. The District Court erred in applying an incorrect standard to determine the sufficiency of the evidence presented to the United States Commissioner.

2. The District Court erred in failing to find that the United States

Commissioner abused his discretion in finding the evidence sufficient to certify petitioner-appellant extraditable and failing to find that there was no showing before the Commissioner of probable cause to believe that petitioner-appellant committed any offense within the treaty with the Republic of Mexico.

3. The District Court erred in failing to find either the matters presented before the United States Commissioner taken as a whole, establish that the statute of limitations of the Republic of Mexico had run on the offenses charged, or that the offenses charged against petitioner-appellant did not fall within the Extradition Treaty.

4. The District Court erred in failing to find that petitioner-appellant had been denied due process of law and a fair hearing before the United States Commissioner by said Commissioner's refusal to authorize the taking of depositions in the Republic of Mexico.

IV.

STATEMENT OF FACTS

By the amended Extradition Complaint, appellant was charged with having committed in the Republic of Mexico the crimes of falsification of official acts of the government or public authority and the uttering and fraudulent use of the same; and embezzlement of public funds by a public officer or depository while employed by Petroleos Mexicanos (hereinafter referred to as PeMex) an agency of the Government of Mexico while acting in the capacity of Superintendent of the District of Poza Rica, State of Vera Cruz, during the years 1957 and 1958 (Clk's Tr. 5). The theory advanced by the United States acting on behalf of the demanding country

apparently was that Merino as superintendent of the field was criminally responsible for a diversion of funds from PeMex and the falsification of documents consisting of contracts for construction works in order to accomplish the diversion. The specific type of contract and the demanding government's evidence will be analyzed hereafter - however, in order to understand the contracts and the financial workings of the PeMex operation at Poza Rica, and Mr. Merino's relationship thereto, it is necessary to review some background information which was presented to the United States Commissioner and the District Court Judge.

BACKGROUND:

From 1938 to 1959 the City of Poza Rica grew in population from 7,000 to over 100,000. The area produced approximately 205,000 barrels of oil per day, which is 31% of the total oil production of Mexico (Tr., p. 301).

PeMex has a Board of Directors consisting of four members elected by the Oil Workers' Union and five members appointed by the President of the Republic (Tr., p. 308). The General Manager is the person who actually operates the company (Tr., p. 308) and decides all policy matters for the company (Tr., p. 309). Antonio J. Bermudez was the General Manager of PeMex for 12 years and was in contact with Merino, the superintendent of the oil fields at Poza Rica, approximately three week-ends each month (Tr., p. 309).

Jaime J. Merino as Superintendent coordinated the activities of all departments of PeMex at Poza Rica and he looked to Antonio J. Bermudez, the General Manager, or to the Assistant Managers, for instruction and guidance. All major decisions were passed on by Mr. Bermudez (Tr., pp. 321-322). In his capacity as Superintendent, Merino was also in contact with the President of the Republic, as

well as the Board of Directors of PeMex. He also conducted labor and contract negotiations with the Oil Workers' Union (Tr., p. 310).

Initially the Oil Workers' Union at Poza Rica had a closed shop (Tr., p. 330) and employees were paid on a portal to portal basis, as well as on an hourly basis (Tr., p. 332).

The labor contract negotiated between the Oil Workers' Union and PeMex provided that the regular and permanent employees of the company were given hospital benefits, schools, and other social commitments were made by the company to its employees (Tr., p. 347). (See Clause 130 of the Labor Contract, which requires PeMex to construct hospitals, schools, and sporting facilities for the oil workers; Tr., p. 776).

When the Mexican peso was devalued from 8.60 to 12.50 for one U.S. dollar there was a strain on Petroleos Mexicanos' finances due to rising costs and the fact that petroleum prices were fixed (Tr., pp. 322-324). With the increase in labor costs the only source for additional money was through increased production (Tr., pp. 323-324).

The oil fields moved away from Poza Rica into the surrounding jungle area. Since the regular employees were paid portal to portal and on an hourly basis, the General Manager, Antonio J. Bermudez, had Clause 1 of the labor contract changed so that the closed shop provisions thereafter had a rather limited application. The contract provided that the laying of gas lines could be performed by contractors (Tr., p. 343), and everything else being equal, the Oil Workers' Union was to be preferred in the granting of contracts for the laying of gas lines (Tr., pp. 343-344). The laying of lines was on a "piecework" basis (Tr., p. 345). There was an

economic advantage to PeMex to lay the lines on a unit price basis (piecework), and resulted in a 75% savings in labor costs (Tr., p. 365).

The area of oil activity and development in Poza Rica was approximately 125 miles long and 30 miles wide; approximately 1,000 wells were in operation and 50 rigs were being used for drilling at one time (Tr. pp. 359, 360). The San Andreas field, which was located away from Poza Rica, reduced the hours that could be spent by the contract laborers on actual piecework, and they began to insist on higher wages - namely, an increase of 25% in the unit price. This was discussed with Antonio J. Bermudez (Tr., p. 350). The demand by the Union for an increase in wages was compromised at an increase of 8% and the Oil Workers' Union was permitted to use heavy equipment of the company, and this solely at PeMex's discretion. This agreement was not reduced to writing and was carried out on an informal basis (Tr., p. 352. See also Tr., pp. 363, 364; see the corroborating statement of Lopez Mata, Ex. 2, p. 290; Tr., pp. 121-122; also the testimony of Roberto Taylor, Tr., pp. 760-769 in which he corroborates not only the testimony of Merino, but also the testimony of Lopez Mata in this connection). Hector Armand Cedillo, Chief of the Department of Construction and Maintenance, said Berman got an 8% increase in the united price and only he got that increase (Ex. 80, p. 2). DeValle stated that Berman received an 8% increase in unit price and no others received this increase (Ex. 80, pp. 2-3).

Beginning in 1955 and continuing until Jaime J. Merino left Poza Rica, Engineer DeValle from Mexico City, with offices in Poza Rica, supervised all contracts in excess of 10,000 pesos ($800), and his signature was required on all contracts in excess of 10,000 pesos (Tr., pp. 338-339; see also Tr., pp. 428-430).

Other signatures required on the contracts were Lopez Mata, an engineer, the Chief Accountant, and an engineer appointed by Lopez Mata to supervise the field work (Tr., pp. 340-341).

During 1957 and 1958 Merino signed between 300 and 400 contracts per month which would be signed daily between 10:00 A.M. and noon (Tr., p. 382). Before Merino signed a contract he relied on the signatures of Lopez Mata and De Valle, as he did in authorizing payments (Tr., pp. 383-384; see also Tr., p. 536).

DeValle could veto an award of a contract over 10,000 pesos, and on many occasions he picked and eliminated contractors without discussing the matter with Merino (Tr., pp. 521-523). DeValle approved any differences or discrepancies (Tr., p. 430) in the contracts over 10,000 pesos ($800 U.S.A.).

Merino did not check the contracts in detail but relied on the signatures of DeValle and Lopez Mata (Tr., p. 431). In the absence of Merino, Mr. Juan C. Robles, who is still employed, signed and his signature appears on some of the Berman contracts in evidence (Tr., p. 432). In Juan Robles' own statement offered by the Government, he said he did not check to see if work was done but relied on prior signatures (Ex. 2, pp. 114-117). Lopez Mata also approved liquidations once they bore approval of his assistants because he trusted the assistants and only rarely did he inspect the work (Ex. 78, p. 15).

In 1957 Berman Castillo was elected by Local 30 of the Oil Workers' Union to head the Contracts Commission of Section 30 and to carry out construction contracts with PeMex (Tr., p. 348). This was at a time when PeMex was laying between 30 and 40 miles of pipeline per month (Tr., pp. 348-349).

To prevent the acquiring of permanent rights with PeMex by contract employees (contracts entered into with the Union for pipeline construction), Berman signed the contracts in his own name. This was with the approval of PeMex and the Oil Workers' Union (Tr., pp. 315-317). These contracts were in fact for and on behalf of the syndicate, Section 30 of the Oil Workers' Union, (Tr., p. 775).

Approximately one-third of the contracts that were awarded for the laying of pipelines were given to Berman Castillo and the contracts provided for periodic payments. Because of the fact that Berman's contracts amounted to approximately 1,000 pesos per month, provisional payments were authorized with a view towards end of month balancing (Tr., p. 358).

TYPES OF CONTRACTS RELIED UPON BY THE GOVERNMENT:

I. Contracts Between Petroleos Mexicanos and Berman Castillo.

Carlos Lopez Mata in an ex parte statement explains the creation of the Contracts Commission of Section 30 and the General Manager (Bermudez) of PeMex ordering the giving of contracts to the Contracts Commission of Section 30 (Tr., pp. 105 et seq.; Ex. 2, pp. 105 et seq.).

Merino, under instructions from Bermudez, told Lopez Mata to give all sorts of facilities to the Union and to permit employees of PeMex to carry out testing, etc. (Tr., pp. 117-122; Ex. 2, p. 289).

Armando Lopez Gonzalez stated ex parte that in some Berman-type contracts certain work required by the contracts was not carried out (Tr., p. 124; Ex. 2, p. 297).

Although the time between signing the contracts and payments under some of the contracts seemed short, many works were carried out prior to the time

of the drawing up of the contracts. At a later date the legal requisite of making the contracts was filed for legal purposes (Tr., p. 110; see also statement of Orozo, Exhibit 2, page 20; statement of Gaona, Exhibit 2, pp. 30-31). In instances this was done because of production, terrain, and the elements, etc. (Tr., pp. 387-389). Merino, because of the expense of running a rig, would authorize drilling before the approval of the blueprints by the government inspectors, which in instances resulted in a fine being assessed against PeMex (Tr., pp. 432-433).

There is attached hereto as Appendix A a summary of liquidations on the Berman-type contracts that were signed by Juan Robles, an assistant to Merino, who normally signed in Merino's absence. These liquidations, signed by Robles, amounted to 1,200,045.38 pesos.

It is significant to note that Exhibit 34, Contract No. 8985, between Petroleos Mexicanos and Berman in the amount of 193,620 pesos, was not signed by Jaime J. Merino. The liquidation under this contract, as reflected in Exhibit 3 at page 27, indicates that Juan Robles authorized the payment of 174,258 pesos.

Exhibit 38, Contract No. 8474, between PeMex and Berman in the amount of 332,040 pesos also was not signed by Merino; Exhibit 3, page 114, indicates that the retention fund of approximately 36,298 pesos and 98 centavos was authorized by Luis Contreras Rodriquez on June 25, 1959, at a time when Merino had left Poza Ricca (Tr., p. 292).

II. Contracts for Construction and Painting of Gas Tank Holders.

This is the second type of contract relied upon by the Government to sustain the charge involves construction of gas tank holders. (Tr.,p. 415; See also Tr., p. 91).

The Assistant Production Manager, Mr. Varaoroco, was under orders from Mexico City to get the gas tank holders built. Because of the cost and inefficient work on construction performed by the regular permanent employees of PeMex, he requested help from Merino (Tr., pp. 417-418). Messrs. Orsonio and Gallegos suggested that Orsonio would supervise and Gallegos would build the gas tank holders. Bermudez approved of Orsonio and of this arrangement (Tr., p. 419).

Exhibit 46, Contract No. 7897, between PeMex and Raul Govea Mena for the painting of the gas tank holders amounted to 47,571.07 pesos. Govea Mena permitted Carlos Orsonio to use his name on a contract and he knew that the work would be done by Ladislao Gallegos (Tr., pp. 91-93). This was common in Poza Rica (Tr., p. 102).

Exhibit 47 indicates the payments under Exhibit 46 (Contract No. 7897) as follows: On page 15, Certificate No. 1, 21600 pesos authorized by Juan Robles. Certificate No. 2 at page 18 in the amount of 21,213.98 pesos, and at page 19, the liquidation of the retention of 4,739.11 pesos, or a total authorized by Merino of 25,953.07 pesos. It is important to note that of the total of 47,553.07 pesos, 21,600 pesos was authorized by Juan Robles.

Exhibit 6, Contract No. 7768 (Tr., p. 107), between PeMex and Raul Govea Mena for the painting of gas tank holders amounted to 47,571.07 pesos. See Exhibit

47 for liquidations. Page 21, Certificate No. 1, indicates that Robles authorized payment of 21,600 pesos; on page 22 of the same exhibit, Certificate No. 2, indicates that Merino authorized 21,213.96 pesos; at page 25, the retention of 4,757.11 was authorized by Robles.

Of a total contract of 47,571.07 Merino authorized 21,213.96 and the balance of 26,357.11 was authorized by Juan Robles.

Exhibit 57, Contract No. 6932, between PeMex and Ortuno in the amount of 53,000 pesos for building gas tank. This contract is not signed by Merino.

Exhibit 47 reflects the following payments:

	Authorized by Merino	Authorized by Robles
Page 1, Certif. 1	10,000 pesos	
Page 3, Certif. 2		10,080 pesos
Page 5, Retention	5,300	
Page 8, Certif. 3		9,540
	24,380 pesos	28,620 pesos

Exhibit 35, Contract 6933 between PeMex and Ortuno - 53,000 pesos.

Exhibit 47 reflects the following payments:

	Authorized by Merino	Authorized by Robles
Page 7, Certif. 1	----------	19,080 pesos
Page 10, Certif. 2	19,080 pesos	----------
Page 12, Retention	----------	5,300
Certif. 3	9,540	----------
	28,620 pesos	24,380 pesos

The Americoat paint used on the contracts with Govea Mena to paint the gas tank holders was furnished by PeMex (Tr., p. 94; see also Tr., p. 99).

Because the form contracts provided the contractor was to furnish all supplies, Merino is charged with a crime because in fact PeMex furnished the

Americoat paint which came from the United States (Tr., p. 421) that was used in the painting of the gas tank holders. Exhibit 6 clearly reflects that the Americoat paint was to be furnished by PeMex. Two coats of Americoat paint cost 7-1/2 pesos (approximately 60¢ U.S.A., or one coat 30¢). Seven coats of primer paint cost 45 pesos ($6.45 U.S.A., or 51.6¢ U.S.A. per coat). This difference in price, 30¢ per coat for Americoat as compared with 51.6¢ for primer indicates the contractor was to furnish only the primer (Tr., pp. 422-425).

Orsonio contributed 10,000 pesos for the building of a hospital, and he was given a receipt for this (Tr., p. 426; see also Tr., pp. 98-99). Exhibit E, a report of the hospital treasurer in January 1959, indicated the contribution was for the municipal hospital (see Exhibits G and H).

The labor contract required PeMex to furnish schools (for permanent employees). When PeMex came into Poza Rica, approximately 150 children were in school but the expansion of the industry caused state and local governments to be unable to cope with the furnishing of social and educational services. PeMex, acting in conjunction with Lions and Rotary Clubs and other service clubs, helped build school and hospital facilities. (Tr., pp. 398-399).

The company hospital at Poza Rica furnished by PeMex consisted of 100 beds and 25 doctors and nurses (Tr., p. 403) and there was no facility to take care of or hospitalize other than permanent employees of PeMex (Tr., p. 403) except in emergencies (Tr., p. 404).

In an attempt to correct the inequitable situation as far as health facilities were concerned, the matter was discussed with the President of the Republic. Thereafter the Governor of the State of Vera Cruz appointed Merino as head of the

Health Department in Poza Rica to collect funds for public health purposes (Tr., p. 408).

The contributions for social activities by the contractors had no connection with the amounts they were paid (Tr., p. 544) or the amount of contracts.

III. Contracts with Manuel Porcel Blanco

As part of its labor contracts PeMex is required to provide certain sports equipment -- basketball -- baseball -- and the company's teams did participate in state and national tournaments (Tr., p. 371). The teams were national baseball champions on three different occasions. The basketball team played in the United States (Tr., p. 372).

Nuncio Gaona was manager of the basketball team. PeMex paid for time and salaries of the participants. (Tr., p. 372).

The budget of 500 pesos per month provided under the Union contract was insufficient to provide financially for all the activities of the athletic teams (Tr., p. 374). Although the baseball team was financially sufficient, the basketball team was not (Tr., p. 376). The additional funds raised to finance these sporting activities were contributed by contractors, as well as concessionaires in Poza Rica (Tr., pp. 377-378). Manuel Porcel Blanco contributed; he had contracts with PeMex that were supervised by Lopez Mata and Nuncio Gaona. Merino was unaware of this until this hearing (Tr., pp. 379-380). Nuncio Gaona indicated Blanco was helping the basketball team of which he was manager (Tr., p. 380). Merino was unaware of the extent to which Blanco helped the team. Since Merino indicated that all things being equal they should help Blanco (Tr., p. 381). Funds were

insufficient to pay for the baseball team's expenses when it won a national championship and Antonio Bermudez issued orders to Engineer Merino to deliver funds to Mr. Taylor (Tr., pp. 770-771) to defray expenses.

Bermudez authorized sending the basketball team to the United States (Tr., p. 434) and Porcel Blanco contributed to help defray the expenses (Tr., p. 438) but there was no prior understanding that if Porcel Blanco received a contract, he would be required to contribute (Tr., pp. 437, 438) to team expenses.

V.

ARGUMENT

A. The District Court Erred in Applying an Incorrect Standard to Determine the Sufficiency of the Evidence Presented to the United States Commissioner.

In dismissing the writ of habeas corpus, the District Court applied the following standard to determine the sufficiency of the evidence presented before the United States Commissioner:

> "The third inquiry which it is the function of this Court to make is whether there is any evidence warranting the finding of probable cause to believe the accused guilty." (Order Dismissing Writ of Habeas Corpus, page 5; Clk's Tr., p. 85.)
>
> "Except as above indicated, the Commissioner's findings are not reviewable in a habeas corpus proceding." (Order Dismissing Writ of Habeas Corpus, page 6; Clk's Tr., p. 85.)

In applying this standard, the District Court relied on Fernandez v. Phillips,

268 U.S. 311 (1925) and other authorities cited in the Order.

It is clear from an examination of the District Court's Order quoted previously that the Court operated on the premise that its power to review the evidence before the Commissioner was limited to the standard quoted in the Order Dismissing the Writ of Habeas Corpus. Although this standard may have appeared correct to the District Court, appellant invites this Court's attention to Townsend v. Sain, 372 U.S. 293 (decided March 18, 1963). Although the Townsend case dealt with federal review of a state criminal prosecution, it would appear clear beyond peradventure that a federal district court's powers of review in a habeas corpus proceeding are certainly no more limited where the Court is reviewing a factual determination by another federal judicial officer such as United States Commissioner, than are such a Court's powers to review factual determinations in state tribunals which have been reviewed by state appellate bodies. Appellant submits that the Townsend case represents a drastic departure from the rules which heretofore appeared to limit the powers of federal courts to review factual determinations in habeas corpus proceedings. (See majority opinion by Mr. Chief Justice Warren, 372 U.S., pages 312, 313, 315, 316 and 322). In view of the rule that limited appellant to filing a petition for writ of habeas corpus in the District Court in order to seek review of the proceedings before the United States Commissioner, it would appear anomalous that the District Court's powers would be more limited than those powers recently enunciated in Townsend v. Sain, supra. If this be so then it would appear clear that the District Court applied an incorrect standard in reviewing the evidence presented to the United States Commissioner.

B. The District Court Erred in Failing to Find That the United States Commissioner Abused His Discretion in Finding the Evidence Sufficient to Certify Petitioner-Appellant Extraditable and in Failing to Find That There Was No Showing Before the Commissioner of Probable Cause to Believe That Petitioner-Appellant Committed Any Offense Within the Treaty With the Republic of Mexico.

Assuming arguendo that the District Court applied a correct standard in testing the sufficiency of the evidence before the United States Commissioner, then appellant submits that nevertheless the evidence presented before said Commissioner was insufficient to support a conclusion there was probable cause to believe appellant committed any offense charged in the extradition complaint and the supporting papers. In considering whether there is any legal evidence to support the Commissioner's determination, the laws of the state where the alleged fugitive is found and not the acts of Congress must be applied. See: Wright v. Henkel, 190 U.S. 40 (1903); Pettit v. Walshe, 194 U.S. 205 (1904).

In Desmond v. Eggers, 18 F. 2d 503,. 505 (9th Cir., 1927), where there was a rejection of an alibi at the extradition hearing of a demand from Canada and the accused was found in the State of Washington, the court at page 505 stated:

> "* * * It must be conceded at the outset that no legal right is given to one accused of crime under the laws of Washington to offer testimony in his own behalf before a committing magistrate."

However, such is not the law of California.

Section 866, California Penal Code, provides:

"Examination of Defendant's Witnesses. When the examination of witnesses on the part of the people is closed, any witnesses the defendant may produce must be sworn and examined."

See also Vaccaro v. Collier, 38 F. 2d 862 at 868-869 (Dist., Ct. Md., (1930) an American citizen apprehended in Maryland for a murder committed in Canada. The defense offered was justifiable homicide. The Court again looked to the law where the accused was found (Maryland) and concluded that justifiable homicide negated criminal intent. This was not in the nature of a defense but evidence to show no crime was committed.

Charlton v. Kelly, 229 U.S. 447, at 461, (1913), a citizen of the United States found in New Jersey and a demand was made by Italy for the crime of murder committed in Italy. There was a refusal to consider insanity. Again the Court looked to the law of New Jersey where insanity is a defense. The Court at page 461 stated:

"* * * At the most the exclusion (insanity) was error not reviewable by habeas corpus. To have witnesses produced to contradict the testimony of the prosecution is obviously a very different thing from hearing witnesses for the purpose of explaining matters referred to by the witnesses for the government."

EMBEZZLEMENT CHARGES:

In California embezzlement has been defined as the appropriation to a use or purpose not in the due or lawful execution of the trust.

California Penal Code, Section 503, Embezzlement Defined:

"Embezzlement is the fraudulent appropriation of property

by a person to whom it has been entrusted."

The essential elements of embezzlement are that the accused was an agent of the prosecuting witness and holding property; that the property actually belonged to the principal, the prosecuting witness; that it was lawfully in the possession of the accused at the time of the alleged embezzlement; that the accused must have been guilty of the conversion; and that there was an intent on the part of the accused to deprive the prosecution witness of his property unlawfully. See People v. Tetrin, 122 C.A. 2d 578, 265 P.2d 158 (3rd Dist., 1954); People v. Cannon, 77 C.A. 2d 678, 176 P. 2d 409 (2nd Dist., 1949); People v. Hewlett, 108 C.A. 2d 358, 239 P. 2d 150 (1st Dist., 1951).

Fraudulent intent is an essential element of embezzlement. People v. Talbot, 220 Cal. 3, 28 P. 2d 1057 (1934). See People v. Steffner, 67 C.A. 23, 227 P. 699 (3rd Dist., 1924). The accused must act in a "trust" capacity and fraudulently appropriate the money entrusted to be guilty of embezzlement.

The essence of embezzlement is defendant's subsequent fraudulent appropriation of property after it has come into defendant's rightful possession. People v. Stanford, 16 C. 2d 247; 105 P. 2d 969 (1940).

In Chappel v. United States, 270 F. 2d 274, 276, 277 (9th Cir., 1959), the charge was knowingly converting to his own use services and labor of a member of the military forces of the United States during duty hours to paint the interior of private dwellings belonging to the defendant. The Court at pages 276, 277 said:

> "* * * It is undoubtedly true in some senses the master's right to the services of his servant may be regarded as property or a thing of value, but the utilization of such services by

a stranger has never to be comprehended within the definition of statutes dealing with larceny, theft or their variants and equivalents."

With respect to embezzlement in violation of Sections 503 and 504 of the California Penal Code, two separate elements are required. First, a diversion of funds from their purpose and secondly a fraudulent intent. Of necessity, there is a dearth of authority on the question of diversion alone. Cases which present a serious question as to whether or not a diversion actually took place are so inconsistent with a fraudulent intent that ordinarily the opinions deal with the total failure to show fraudulent intent and do not address themselves to the question of diversion. We should not, however, lose sight of the fact that an actual diversion is an essential element of embezzlement and appellant submits that the government's evidence wholly fails, even on this point in the instant case.

One case which is actually quite similar to the instant proceedings if we examine the principle involved is People v. Mills, 41 C.A. 2d 260, 106 P. 2d 216 (4th Dist., 1940), which involved a prosecution of an individual who was director, secretary and manager of a cooperative marketing organization. Defendant was authorized to make advances of the cooperative's funds as he saw fit. After examining the evidence offered in support of the allegation that defendant's advances to himself constituted embezzlement, the court found that the conviction should not stand and noted:

"We are unable to find any evidence in the transcript which would support the conclusion that the advances taken by the appellant upon his crops were in excess of his authority, that they were

> out of proportion to advances made to others, or that they were made with knowledge on the part of the appellant that they were excessive or not justified by the size and quality of his crop under market conditions as they appeared at that time. While many immaterial matters were ingeniously marshalled and presented to the jury as they appeared in retrospect, the real issues as to whether the advances upon which a conviction was sought were justified by the conditions existing at the time they were made were largely overlooked both in the presentation of evidence and in the respondent's arguments to the jury. There is no proof in the record that the advances in question were more liberal, in view of the conditions, than those made to some of the other members, that they were determined or fixed upon any other or different basis, or that they were not justified by the conditions as they then appeared. Whatever else it shows, the evidence fails to show a fraudulent appropriation of the advances for the taking of which he was convicted under the various counts, and the evidence is insufficient to support the judgment." (p. 266)

It is submitted that the principles involved in the Mills case are strikingly applicable to those involving Mr. Merino. The evidence submitted on his behalf is totally uncontradicted and unimpeached. It illustrates that in all activities involving PeMex, Mr. Merino was acting with the specific authority and carte blanche

authorization of Mr. Bermudez and hence there was no diversion of funds from the general purposes of Petroleos Mexicanos. Secondly, it is clear beyond peradventure that an examination of the entire record in the instant proceeding wholly fails to support a conclusion that Mr. Merino at any time acted with the subjective intent to defraud Petroleos Mexicanos. Rather, it is consistent only with a conclusion that at all times Mr. Merino acted with the intent to aid, benefit and develop Petroleos Mexicanos to the best of his ability.

On the issue of the failure to show an unauthorized diversion in fact, the court's attention is invited to People v. Wilde, 42 C.A. 2d 432, 184 P. 2d 32 (4th Dist., 1941), holding that the evidence was insufficient to show lack of authority of a trustee to invest in real property.

On the issue of the fraudulent intent necessary to constitute the offense of embezzlement, the court's attention is respectfully invited to the following authorities:

People v. Whitney, 121 C.A. 2d 515; 263 P. 2d 449 (4th Dist., 1953), holding instructions on embezzlement which failed to specify the element of fraudulent intent were prejudicially erroneous.

People v. Morely, 89 C.A. 451, 265 Pac. 276 (2nd Dist., 1928), holding that it was prejudicial error with respect to an embezzlement count to refuse to permit the defendant to testify that he believed that he was acting with authority.

People v. Mitchell, 74 C.A. 164, 240 Pac. 36 (3rd Dist., 1925), which sustained an order granting a defendant a new trial on the ground that an instruction which omitted the necessary element of fraudulent intent in an embezzlement prosecution was erroneous.

Mr. Merino in no way concedes that any of his actions involving PeMex were tainted in any manner whatsoever. However, it should be pointed out that much of the government's evidence appears directed toward what are generally referred to as "kickbacks." It should be made clear, therefore, that there are specific statutes which do not fall within the embezzlement field dealing with prohibited activities along this line. Attention is invited to Title 18, United States Code, Section 874, involving public works contracts and Title 41, United States Code, Sections 51 and 54 dealing with cost reimbursible contracts in which the Federal Government is interested, and Section 1094 of the Government Code of the State of California involving conflicts of interest. Even if there were some basis for concluding that appellant - petitioner violated one or more of these statutes and could be bound over for trial in the State of California, there is nothing to indicate that such violations would come within the terms of the Treaty between the United States and the demanding government.

The instant case therefore is clearly distinguishable from that of Jimenez v. Aristeguieta, 311 F. 2d 547 (5th Cir., 1962) cert. denied 373 U.S. 914, which is actually authority for the proposition advanced by appellant herein - namely, a kickback violation does not fall within the treaty with the Republic of Mexico. The Jimenez case involved a request for extradition to Venzuela and page 563 of the opinion specifically notes that the treaty with Venezuela provided for extradition in cases of "fraud or breach of trust". An examination of the treaty with the Republic of Mexico (31 Stat. 1818) demonstrates that there is no similar provision in the treaty with Mexico which would cover a so-called kickback violation.

Perhaps at this juncture it would be appropriate to note that any payments by

contractors in the instant case were actually inurring to the benefit of Petroleos Mexicanos. Even viewing the evidence of the plaintiff in a light most favorable to it, the most it shows is that any funds which came back from the contracts were devoted to public health or sports activities of Petroleos Mexicanos. Actually it would appear that the demanding government has placed itself on the horns of a dilemma in that what they are saying is: "Mr. Merino you must answer for the fact that while as superintendent of PeMex you permitted some of the profits involving contracts with that company to come back to it for its own use and benefit rather than limiting contracts to persons who were willing to and did pocket all of the proceeds for their own private uses."

Again a comparison with the situation involving Mr. Jimenez of Venezuela is significant and points up the total lack of criminality in any of the acts performed by appellant Merino. In reviewing the factual determinations by the judicial officer who actually conducted the extradition hearing, the Circuit Court noted as follows:

> "Judge Whitehurst found that each of the acts was 'for the private financial benefit' of the appellant. They constituted common crimes committed by the chief of state done in violation of his position and not in pursuance of it." Jimenez v. Aristeguieta, supra, p. 558.

Carlos Lopez Mata (Tr., p. 105, pp. 117-122, Ex. 2, p. 278) stated that Merino under instructions from Bermudez told Lopez Mata (Merino's assistant) to give all sorts of facilities to the Union and to permit employees of PeMex to carry out testing, etc.

Merino's testimony is uncontradicted (Tr., pp. 438, 439 and 446) indicated

he did not receive any benefit and at all times was carrying out company policies and objectives and at all times acted as a subordinate of Bermudez (Tr., p. 526).

Roberto Taylor, a treasurer of the Oil Workers' Union at Poza Rica (Tr., p. 747), corroborates Mr. Merino to the effect that meetings were held on weekends at the airport between interested parties, Merino and Bermudez, and Bermudez authorized an increase in the contract price (Tr., p. 790) and that PeMex equipment was used by the Union with authorization by Bermudez (Tr., p. 792). Berman's committee rendered a report and the auditing committee verified with PeMex the amount of monies PeMex paid to Berman (Tr., pp. 759-760). It would appear on the basis of this testimony which is unrefuted that the property that was being used was not diverted or fraudulently appropriated, essential elements in the crime of embezzlement (peculado).

There is also a failure on the part of the Government to show an essential element that the property was entrusted to or received by Mr. Merino.

A Superintendent of the Poza Rica fields cannot be guilty of peculation unless he and the cashier are out to do the same thing (Tr., pp. 669-672) because the Superintendent has not <u>received</u> the funds and does not have access to the funds (Tr., pp. 680, 681; also Tr., p. 705; see also the Government witness, Tr., pp. 256, 257).

The Chief Accountant of PeMex and the funds of PeMex were not under the custody or control of Merino and he did not have a key or combination to the safe (Tr., pp. 530-535, 577).

In order to finance the athletic teams that were sponsored by PeMex in Poza Rica it was necessary to seek contributions from contractors and concessionaires

in Poza Rica (Tr., pp. 377-378). Manuel Porcel Blanco contributed to help defray the expenses of the athletic teams (Tr., pp. 379, 380, 381). There was no prior understanding that if Porcel Blanco received a contract he would be required to contribute to the athletic teams' expenses (Tr., pp. 437, 438; also see the corroborating evidence of Roberto Taylor as to the fact that schools, etc., were built by community participation and various committees of the Oil Workers' Union contributed; Tr., p. 766, as well as Tr., pp. 759, 760).

The Government's own expert on Mexican law testified that payments made by PeMex, and later the contractor contributes part of these monies for a sporting activity or the building of a community project, could not be "public funds" unless there was a prior understanding and the contract price had been changed. (See Tr., p. 250, ll. 20 through p. 251, l. 9).

In the light of the foregoing it is submitted that the evidence presented before the United States Commissioner wholly fails to establish a predicate upon which it could be found that there was probable cause to believe appellant committed the offense of embezzlement.

FORGERY OR FALSIFICATION:

Turning first to the offense of forgery, respondent's evidence wholly fails to show probable cause to believe appellant is guilty of a violation of Section 470 of the Penal Code. Nowhere in the voluminous documentary evidence presented by plaintiff-Government is there a scintilla of evidence to support a conclusion that any writing was other than exactly what it purported to be and had been executed by the person purporting to execute the same. In this connection, the court's attention is invited to People v. Bendit, 111 Cal. 274, 43 Pac. 901 (1896), wherein

the court noted:

> " * * * When the crime is charged to be the false making of a writing, there must be the making of a writing which falsely purports to be the writing of another. The falsity must be in the writing itself -- in the manuscript. A false statement of fact in the body of the instrument, or a false assertion of authority to write another's name, or to sign his name as agent, by which a person is deceived and defrauded, is not forgery. There must be a design to pass as the genuine writing of another person that which is not the writing of such other person. The instrument must fraudulently purport to be what it is not." (Pp. 276, 277)

*****

> The definition is therefore essentially the same in both instances; and it is the same in the statutes of all the other states to which our attention has been called, but the meaning of the words 'false making' when applied to forgery is that hereinbefore stated. (P. 280).

Some of the preceding language was quoted with approval and held controlling as recently as 1955 in Pasadena Investment Company v. Peerless Casualty Company, 132 C.A. 2d 328, 282 P. 2d 124 (2nd Dist., 1955), which involved an action on a forgery bond and the court concluded that fictitious invoices which had actually been signed by the person purporting to sign the same did not constitute a forgery.

People v. Valdes, 155 C.A. 2d 613, 319 P. 2d 118 (2nd Dist., 1957),

illustrates another fatal defect in plaintiff's case with respect to the forgery charge. This case points out that it is essential for proof of a violation of 470 of the Penal Code that the defendant knew of his lack of authority and that he entertained a fraudulent intent. Certainly there is nothing in the record before the court that would in any way justify an inference that Mr. Merino at any time knew that he was acting without authority or that he entertained a subjective intent to defraud. Rather, the completely unrebutted and uncontradicted evidence presented on behalf of the appellant is to the effect that at all times he was acting in good faith and with what he thought was the "carte blanche" authority of Mr. Bermudez and that at all times Mr. Merino acted not with the intent to defraud, but with the intent to benefit Petroleos Mexicanos.

An additional point should be noted with respect to the contracts which were made in the names of persons other than those who actually performed the contract. Defendant is frankly at a loss to understand how, by any stretch of logic or law, these contracts could be termed false or forged. It is patently obvious that the persons who signed the contracts were in truth and fact the persons who actually purported to do so. At the most, it would appear that these transactions involved an undisclosed principal and that a valid and binding contract was actually formed. In this connection, attention is invited to Volume 3, Section 603, page 623, Corbin on Contracts.

As to the falsification of documents it is the allegation of the Government that the contracts and payment vouchers were official records and documents of the Government and within the Treaty. The Government expert (Tr., pp. 208 and 210) stated that the Superintendent of PeMex cannot commit the crime of forgery

or falsification of public records because a contract signed by PeMex is not an act of authority. The defense witness Stern was in accord with this. (See Tr., pp. 713-721.)

Stern expressed the opinion that PeMex was not a government agency, authority or corporation and was subject to the rules of private law (Tr., pp. 596, 597; also Tr., pp. 599 and 602). The only United States equivalent of PeMex is the American Red Cross (Tr., pp. 656, 657). Merino was not a public official or officer. Public officials and officers are required to take an oath and receive appointments. Both experts agreed to this (Tr., pp. 182, 225; see also p. 606).

The expert for the Government (Tr., pp. 226-228) indicated who were the functionaries of PeMex (functionary being a public official or officer). The Superintendent of the field at Poza Rica was not among those listed. Merino was a "trusted employee -- a technical employee, not subject to membership in a labor union, an administrative employee." (See Tr., pp. 228, 294-295.)

The Government expert expressed doubt and was not sure whether a person employed by a decentralized public service which grants contracts for construction work and upon completion authorizes payment thereof and later receives from the contractor's agent a portion of the contract price, has committed the offense of peculation (Tr., pp. 69-70, 71). Merino was an employee (Tr., p. 72; also see Tr., p. 607).

To indicate that PeMex is a private person and has the attributes of a private person the defense on cross-examination of the Mexican Government witness developed:

PeMex pays taxes (Tr., p. 177, l. 20; see also Tr., p. 176).

It is debatable if loans to PeMex must receive the approval of the Congress (Federal) (Tr., p. 189). It was not known whether or not loans to PeMex increased the national or public debt (Tr., p. 190, ll. 15-21).

PeMex can ask for an Amparo (Tr., p. 206, ll. 15-16), which the Government cannot ask for.

PeMex does not have authority to use public force for the compliance with determination (Tr., pp. 207-208) and a superintendent of PeMex does not have such power (Tr., p. 208).

The decree of December 2, 1944, provides that PeMex must indemnify the Federal Government for any monies paid to oil companies because of expropriation and must pay interest on the obligation (Tr., p. 218).

Merino was not required to execute an oath (Tr., p. 369) and the trucks and equipment have common license plates (Tr., p. 369). Merino did not file a statement with the Federal Government of all real and personal property that he owned (Tr., p. 370). All these factors demonstrate that Merino was not a Government officer dealing with official documents.

Appellant's expert, Dr. Stern, made three separate studies of PeMex and its relationship to the Government of Mexico (Tr., p. 593) and indicated:

(1) PeMex can own property in its own name and it is not property of the state; it can alienate its property freely and can contract (Tr., p. 603).

(2) The funds of Pemex are not government funds (Tr., p. 608)

(3) Decentralized institutions are not part of the Government (Tr., p. 610).

For the foregoing reasons it is submitted that the evidence presented before

the United States Commissioner wholly failed to establish there was probable cause to believe that Merino was guilty of forgery or falsification of official documents as charged in the Extradition Complaint and the supporting papers.

C. The District Court Erred in Failing to Find Either the Matters Presented Before the United States Commissioner Taken as a Whole Established that the Statute of Limitations of the Republic of Mexico Had Run on the Offenses Charged or That the Offenses Charged Against Petitioner-Appellant Did Not Fall Within the Extradition Treaty.

STATUTE OF LIMITATIONS:

The investigation of the offenses with which Mr. Merino is charged was not commenced in the Republic of Mexico until December 30, 1959 (Ex. 3, p. 1). Merino had already departed from the Republic of Mexico and had arrived in Los Angeles, California, in January of 1959, almost one full year prior to the commencement of the investigation in Mexico (Tr., p. 292). The Extradition Complaint was not filed until February 1, 1960 (Clk's Tr., p. 2).

"Q What does Article 113 provide?

A The liability for official crimes and faults can be demanded only during the period in which the official exercises his charge, and within one year thereafter.

Q Does the Federal Penal Code provide a statute of limitations as to certain crimes?

A Yes, it does.

Q Have you reviewed Title 5, Chapter VI, Article 110 and Article 111?

A Yes.

Q What does it provide?

A Title 5, Extinction of criminal liability. Chapter VI, Prescription.

Your Honor, I used 'prescription' instead of 'statute of limitations,' because the term 'statute of limitations' is used in common law countries.

Article 110. Prescription of actions is interrupted by proceedings of investigation of the crime or criminals, even though because the latter are unknown, proceedings do not take place against a specific person.

If there is an omission to proceed, prescription begins to run anew on the day following the last step taken.

Article 111. The provisions contained in the preceding article do not include the case in which the proceedings are begun after the elapse of one half of the time necessary for prescription to run; in the latter case, prescription will not be interrupted except by the apprehension of the accused.

Q Doctor, considering those various sections, and assuming for the purpose of this particular question that a person is a public official or a public officer; that this person has been relieved from his duties as superintendent of the Poza Rica District of Petroleos Mexicanos on December 28, 1958, that an official investigation is not commenced until December 29, 1959, or January 6, 1960, a period of time which is more than

six months after he left his position as superintendent of the Poza Rica District, and this person is not captured until February 1, 1960, some 14 months after he was relieved from his official duty as superintendent of the Poza Rica District, would in your opinion, based on the law which you just read, the statute of limitations have run against that particular party for his crime as an officer or official?

* * * * *

THE WITNESS: The prescription would have run." (Tr., pp. 723-726).

Under this analysis, appellant respectfully submits that the United States Commissioner erred in not determining that the statute of limitations on the offenses charged against Merino had lapsed under the law of Mexico.

FAILURE TO SHOW OFFENSE WITHIN TREATY:

Again turning to the testimony of Dr. William Stern who was presented as an expert on Mexican law by appellant, he testified before the United States Commissioner as follows:

"Now, in fact, the Mexican Supreme Court has numerous interpretations of what peculado is, and within the recent decade, let's say, peculado can be defined as embezzlement when committed against the public interest, and it cannot be committed by a public functionary.

Again, your Honor may have seen that peculado is in a title of the code. Article 220 of the code is entitled, 'Crimes

committed by Public Functionaries.' That is rather confusing. Actually the penal code is dated 1941. The law of responsibility of public functionaries is a later statute, 1947. The latest statute supersedes as to the specific phases covered by the special statutes, the general code. So at this time as shown in the judicial definition, peculado can be committed only by somebody who is not a public functionary, public official or public employee."(Tr., pp. 672-673).

"THE WITNESS: That is right. If he were a public official the law concerning the responsibilities of public functionaries would apply.

THE COMMISSIONER: And that is the 1947 law?

THE WITNESS: That is right.

THE COMMISSIONER: What does the 1947 law say then?

THE WITNESS: They have provisions covering various factual circumstances similar to peculado.

THE COMMISSIONER: But they don't call it peculado?

THE WITNESS: No, it is called abuse of confidence.

THE COMMISSIONER: Abuse of confidence?

THE WITNESS: Yes.

MR. O'LAUGHLIN: Not 220 in the penal code.

THE COMMISSIONER: It is not 220 in the penal code?

THE WITNESS: No.

THE COMMISSIONER: What section is that in the 1947 law? How is it identified? Is it in the code?

THE WITNESS: Yes. There is a list, either 15 or 20 items, which if committed by a public functionary are deemed a crime and are punished so-and-so and such-and-such.

THE COMMISSIONER: What section of the code is that?

THE WITNESS: That is not in the penal code.

THE COMMISSIONER: That is not in the penal code?

THE WITNESS: No, that is a special law.

THE COMMISSIONER: It is a special law?

THE WITNESS: Yes.

THE COMMISSIONER: Like our Statutes at Large?

THE WITNESS: It is the same thing as the State of California has a penal code and then passes a specific statute on a particular point where, let's say, it founded the Business and Professional Code, and that supersedes the general provisions of the penal code.

THE COMMISSIONER: I understand you.

MR. O'LAUGHLIN: There is a volume of the law, a special section called the Law of Responsibilities of Functionaries.

THE WITNESS: Yes.

THE COMMISSIONER: And this law of responsibilities of functionaries applies to public officials or public officers, isn't that correct?

THE WITNESS: Public officers and employees as covered by

the law.

Now the best definition I have seen of what peculado is, is found in a case, a 1959 case, which is found on Pages 6 and the top of Page 7 of my memorandum.

It is the case of Luis Flores Garcia, and it shows that whenever an activity of a decentralized institution is conducted in the public interest that the embezzlement is deemed to be peculado, and in order to determine whether the public interest is affected the Supreme Court takes, according to its own wording, into account the historical, sociological, economic, philosophical and legal premises which give rise to the creation of that institution. This is the present interpretation of what is peculado.

In the Luis Flores Garcia case, it was a case in which the government established a bank, a bank for agriculture and cattle credit. It is a bank of its own, it is not a government corporation, it is a decentralized institution, a corporation of its own. And it was held that its employees, they are not public officers, but they can commit peculado.

Why? Because the government has to provide the farmers and settlers who were given expropriated land, they needed money, and the government established the banks so that credit would be given to these farmers and settlers.

THE COMMISSIONER: Is that similar to Pemex in that they had expropriated land for purposes of raising cattle and for agriculture, whereas Pemex took over expropriated lands for petroleum purposes?

THE WITNESS: That is so, and you will find that practically literally stated on Pages 5 and 6 of this memorandum.

THE COMMISSIONER: So it is very similar in nature to Pemex then?

THE WITNESS: Yes.

So it may be a little bit strange to us how the Mexican Supreme Court arrives at the solution whether something is in the public interest, it takes into account historical, sociological, economic, philosophical and legal premises, legal being last.

Q BY MR. O'LAUGHLIN. Now, Dr. Stern, it is my understanding that as far as public officials or public officers are concerned, the law of responsibility applies, is that right, as distinguished from a penal code?

A That is correct. A special statute applies instead of the general code." (Tr., pp. 674-677).

Appellant again respectfully invites the Court's attention to Jimenez v. Aristeguieta, supra, p. 563, where the Court noted that the treaty with Venezuela had a provision for fraud or breach of trust. It is submitted that an examination of the treaty with which we are here involved (31 Stat. 1818) as noted before, wholly fails to show that a breach of trust or "abuse of confidence" offense falls within

the terms of the agreement with the Republic of Mexico. In view of the absence of this provision in the treaty with Mexico, appellant respectfully submits that the United States Commissioner erred in failing to find that the offenses charged against appellant did not fall within the provisions of the treaty with the Republic of Mexico.

D. The District Court Erred in Failing to Find That Petitioner-Appellant Had Been Denied Due Process of Law and a Fair Hearing Before the United States Commissioner by Said Commissioner's Refusal to Authorize the Taking of Depositions in Mexico.

Prior to the commencement of the hearing before Commissioner Hocke on May 24, 1960 (Tr., p. 5), appellant by and through his counsel on April 25, 1960, filed a Notice of Motion and Motion to Take Depositions supported by an Affidavit filed the same date April 25, 1960, of Attorney Barton C. Sheela (Clk's Tr., pp. 10, 11 and 12). The Affidavit in support of the motion alleged that absent some Order of the Commissioner authorizing the taking of depositions that counsel for appellant would be mere interlopers in the Republic of Mexico with no apparent authority, but if the Order were issued then the Government of Mexico and its judicial officers would give counsel for appellant the opportunity to take such testimony. The supporting Affidavit further states the names of the persons whose depositions are desired to be taken and the materiality of their testimony. In further support of the request to take depositions the Affidavit in support thereof states that a number of the witnesses who gave statements against appellant were in custody and that

threats and promises were made against said persons in order to obtain statements against Merino.

It should be specifically noted that the request of appellant herein to take depositions was in no way tardy. Rather, from the very outset, counsel for Mr. Merino vigorously urged that a proper and fair determination of the issues to be determined before the Commissioner demanded that counsel be given the opportunity to take depositions in the Republic of Mexico. The instant case therefore is totally different from that presented to the Court in Jimenez v. Aristeguieta, supra, where the Court noted after considering the allegation by appellant therein that due process was denied him by failure to be afforded the opportunity to take depositions as follows:

> "Even if a deposition were available, the denial of appellant's belated request for the deposition of Dupouy would not constitute abuse of the extradition judge's 'judicial discretion, and his judgment cannot be reviewed upon this proceeding'. *** Dupouy was in the United States. He was a party to the case in New York opposing Venezuelas' effort to secure evidence regarding appellant's funds on deposit in certain banks, and Judge Whitehurst did not deny appellant the right to offer Dupouy as a witness." Jimenez v. Aristeguieta, supra, pp. 556-557.

Appellant herein was in no way remiss in pressing his request to take depositions and the persons whose depositions were sought as evidenced by the supporting Affidavit were not within the United States but rather within the Republic of Mexico. The Affidavit in support of the request specifically spelled out the

names, addresses and materiality of the testimony to be given by the deponents. Furthermore, it should be noted that in a companion case to that just quoted it was determined on appeal that the demanding government did not have the right to take depositions. This issue is now the subject of consideration by the Supreme Court, certiorari having been granted. Aristeguieta v. Jimenez, 274 F. 2d 206 (5th Cir., 1960) cert. granted 365 U.S. 840; First National Bank v. Aristeguieta, 287 F. 2d 219 (2nd Cir., 1960) cert. granted 365 U.S. 840.

In his application to the United States Commissioner, to the District Court and previous applications to this honorable Court for relief from the Commissioner's ruling, appellant has pointed out a number of factors which it is submitted should point to the conclusion that Luis Oteiza y Cortez v. Jacobus, 136 U.S. 330 (1890) decided some 73 years ago should not be controlling in an extradition proceeding in the 1960's. In the first place the case was decided prior to the Japanese Immigrant Case, 189 U.S. 86 (1903) indicating that aliens were entitled to due process. Of more importance, however, have been the recent developments in state and federal criminal proceedings dictating that the rules of fundamental fairness must be adhered to in cases where an accused's life or liberty is at stake.

The State of California has, in a sense, spearheaded one aspect of guaranteeing fair trials to a defendant in the field of pretrial discovery. The obvious rationale of the cases which will be mentioned hereafter, and which is spelled out in the language contained therein, is that when life and liberty are at stake, the proceeding does not become a game in which the government with its might and power can pick and choose what evidence may or should be made available to a

defendant. Opinions point out that the requirements of fundamental justice dictate that persons called as witnesses against a defendant should be cross-examined as vigorously as possible and that the accused should be given a fair opportunity to prepare his defense. In this connection, see People v. Riser, 47 Cal. 2d 566, 305 P. 2d 1 (1956) holding that it was error to refuse pretrial production of statements by prosecuting witnesses. See also Powell v. Superior Court, 48 Cal. 2d 704, 709; 312 Pac. 2d 698 (1957); Norton v. Superior Court, 173 Cal. App. 2d 133; 343 P. 2d 139 (4th Dist., 1959); Funct v. Superior Court, 52 Cal. 2d 423; 340 P. 2d 593 (1959); People v. Chapman, 52 Cal. 2d 95; 338 P. 2d 428 (1959) and the collection of cases and analysis in People v. Cooper, 53 Cal. 2d 755, 769; 349 P. 2d 964 (1960).

Although the strides made by the California courts for the accused criminal case have been great, they have not been unmatched by the action of the Supreme Court of the United States. In Elkins v. United States, 364 U.S. 206 (1960), the Court overruled the "silver platter doctrine" established by Weeks v. United States, 232 U.S. 383 (1914).

Of more significance, however, to the instant inquiry is Jenks v. United States, 353 U.S. 657 (1957) holding that refusal on the part of the government to produce statements of a prosecution witness concerning matters to which he has testified on direct examination could result in compelling the government to dismiss the action. As an outgrowth of this case and to prevent what might apparently have been considered a carte blanche right to examine government files, Congress elected to pass the so-called Jenks Act now titled 18 United States Code, Section 3500. After passage of this act it appeared that Congress could constitutionally limit the effectiveness with which an accused in a criminal proceeding could operate in the

production of evidence and the cross-examination of witnesses. Appellant, however, respectfully submits that on May 13 of this year the Supreme Court of the United States cast serious doubt on the legality of any proceeding within the framework of due process which hampers or impedes the accused's presentation of his case whether on the question of guilt or innocence or on the question of punishment. Appellant refers to Brady v. Maryland, 373 U.S. 83 (May 13, 1963) wherein Mr. Justice Douglas, speaking for the majority of the Court noted:

> "We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."
>
> "The principle of Mooney v. Holohan is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused. Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly. An inscription on the walls of the Department of Justice states the proposition candidly for the federal domain: 'The United States Wins Its Point Whenever Justice Is Done Its Citizens in the Courts.' A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant." 373 U.S. 887-888.

If it is a violation of the fundamental rights guaranteed by the due process

clause of the federal constitution to fail to turn over to an accused evidence which is favorable to him but which has been assembled by the prosecution a fortioria it would appear a violation of the fundamental requirements of due process to preclude an accused in an extradition case from presenting evidence which was favorable to his cause. In view of the decision in Brady v. Maryland, supra, appellant respectfully submits that the Court should decline to follow the Jacobus case, supra, and hold that appellant was denied due process of law by the Commissioner's failure to grant a timely request to take depositions in the Republic of Mexico.

VI

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the order of the District Court dismissing the writ of habeas corpus should be reversed.

Respectfully submitted:

SHEELA, O'LAUGHLIN, HUGHES & HUNTER
Attorneys for Appellant

By PETER J. HUGHES

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

PETER J. HUGHES

APPENDICES

Schedule Reflecting Liquidations (Payments) Authorized by Others than Merino

Exhibit 3 Page No.	Liquidation Contract No.	All Signed by Robles Amount	
1	9207 (p. 1, Exh. 3)	350	pesos
2	9206 (Exh. 62)	225	
3	9231 (24,121.50 total), p. 29, Exh. 3	2,412.15	
4 and 31	9230 (Exh. 25 - 27, 300)	2,730	
5	9204	6,209	
6	9203 (p. 3, Exh. 3)	10,644	
8	9102 (p. 5, Exh. 3)	35,938.80	
10	8489 (p. 7, Exh. 7)	41,652.14	
12	7269 (p. 10, Exh. 3)	182,700	
14 - 41	8986 (Exh. 27 - 34,090)	3,409	
15	8987 (p. 13, Exh. 3)	5,292	
8 & 16	9102 (35,938.80 and 3,993.20 39,932 total)	3,993.20	
17 & 43	9060 (Exh. 32 - 61,180; Exh 29- 28,874.62)	6,118	
18 (not signed)	8942	2,887.46	
19	8940 (p. 17, Exh. 3)	6,070.09	
20	8941 (Exh. 26 - 37,412.70)	3,741.27	
21	8909 (Exh. 19, 57,531.50)	5,753.15	
22	8937 (Exh. 21 - 66,870.89)	6,687.09	
23	8938 (Exh. 41 - 41,512.28)	4,151.23	
24	8934 (Exh. 52 - 18,113)	1,811.30	

Exhibit 3 Page No.	Liquidation Contract No.	All Signed by Robles Amount
25	8939 (Exh. 57 - 55,478.28)	5,547.83
26	8943 (p. 21, Exh. 3)	5,157.50
27	8985 (p. 22, Exh. 3)	174,258
29 & 6	9203 (Exh. 28 - 106,440)	95,796
30	9204 (p. 26, Exh. 3)	55,881
31	9230 (p. 27, Exh. 3)	24,570
33	9231 (p. 29, Exh. 3)	21,704.35
34	9205	2,025
35	9207 (p. 34, Exh. 3)	3,150
37	8851 (p. 36, Exh. 3)	2,786.32
38	8873 (Exh. 56 - 60,317.46)	6,031.75
39	8852 (p. 37, Exh. 3)	5,203.33
40	8620 (p. 38, Exh. 3)	8,298
41	8986 (p. 38, Exh. 3)	30,681
15 & 42	8987 (47,628 and 5,292 - 52,920)	47,628
43	9060 (p. 42, Exh. 3)	55,062
63	8489 (p. 69, Exh. 3)	4,628.02
64	8332 (Exh. 34 - 29,112.98)	2,911.30
65	8366 (Exh. 38 - 37,459)	3,745
66	8458 (Exh. 55 - 21,457.82)	2,145.70
67	8490 (Exh. 45 - 36,861.50)	3,686.15
108	7269 (p. 10, Exh. 3)	174,960

Exhibit 3 Page No.	Liquidation Contract No.	All Signed by Robles Amount
114 (Berman contract)*	8474 (p. 73 Exh. 3)	36,298.98
116	7305 (Exh. 37 - 112,373.40)	11,237.34
117	7510 (Exh. 23 - 31,210.35)	3,121.03
118	7571 (Exh. 47 - 224, 400)	22,440
119	7738 (p. 136, Exh. 3)	45,414
120	7698 (Exh. 35 - 14,392.01)	12,952.81

* Luis Contreras Rodriguez successor, 6/25/59 when Merino out of Poza Rica.

APPENDIX B

TABLE OF EXHIBITS

(All exhibits were offered and received by the District Court on December 14, 1962. Clk's Tr., p. 84. The following table, therefore, refers to pages of the proceedings before the United States Commissioner where exhibits were identified, offered and received.)

Exhibit No.	Identified	Offered	Received
1	Page 10	Page 13	Page 15
2	Page 14	Page 14	Page 15
3 through 72	Page 88	Page 88	Page 91
73	Page 88	Page 88	Page 142
76	Page 88	Page 88	Page 142
77	Page 88	Page 88	Page 142
78 through 81	Page 135	Page 584	Page 585
A	Page 304	Page 447	Page 447
B	Page 368	Page 447	Page 447
C	Page 377	Page 447	Page 447
D	Page 408	Page 447	Page 447
E	Page 408		
F	Page 414	Page 447	Page 447
G	Page 455	Page 457	Page 457
H	Page 460		
I and J	Page 461	Page 461	Page 462
K	Page 462	Page 468	Page 468

Exhibit No.	Identified	Offered	Received
L and M	Page 466	Page 468	Page 468
N, O, P, Q	Page 467	Page 468	Page 468
R	Page 468	Page 468	Page 468

No. 18714

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JAIME J. MERINO,

Appellant,

vs.

UNITED STATES MARSHAL,

Appellee.

APPELLEE'S BRIEF.

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TOPICAL INDEX

TABLE OF AUTHORITIES CITED

No. 18714

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JAIME J. MERINO,

Appellant,

vs.

UNITED STATES MARSHAL,

Appellee.

APPELLEE'S BRIEF.

I.

JURISDICTIONAL STATEMENT.

This is an appeal from an Order Dismissing Writ of Habeas Corpus, entered in the United States District Court for the Southern District of California on April 3, 1963.

The jurisdiction of the District Court was based upon Title 28, United States Code, Section 2241(a). This Court has jurisdiction to entertain this appeal under the provisions of Title 28, United States Code, Section 2253.

II.

STATEMENT OF THE CASE.

On February 1, 1960, an extradition complaint was filed with the United States Commissioner, Los Angeles, against appellant herein. On April 12, 1960, an amended complaint was filed, setting forth the basis

for extradition proceedings, including the fact that appellant was not a citizen of the United States.

The amended complaint also alleged in essence that appellant had sought asylum in the United States and was in the United States and had been duly and legally charged with having committed in Mexico the crimes of embezzlement of public funds and falsification of official acts and uttering or fraudulent use of the same.

On April 25, 1960, appellant moved the United States Commissioner for the Southern District of California for an order authorizing the taking of depositions of certain persons in Mexico. Said motion came on for hearing before the United States Commissioner on May 26, 1960, and was denied.

On July 7, 1960, appellant sought relief from the United States Commissioner's order denying the above-mentioned motion by filing an application for a writ of mandamus and, in the alternative, a motion for an order, before the United States District Court for the Southern District of California, Central Division. The application and motion were denied on July 12, 1960. Notice of Appeal was served by appellant on July 15, 1960. The appeal was dismissed by this Court on April 26, 1961, in *Merino v. Hocke,* 289 F. 2d 636 (9th Cir. 1961).

On December 27, 1961, appellant made an application for writ of mandamus and for an order, which were denied on April 27, 1962. Notice of appeal to this Court was filed on April 27, 1962. That appeal (No. 18271) has not been concluded.

On June 12, 1961, Commissioner Theodore Hocke, Los Angeles, entered an order finding appellant extraditable. Appellant filed a Petition for Writ of Habeas Corpus on June 21, 1961. The United States District Court entered an Order Dismissing Writ of Habeas Corpus on April 3, 1963. Appellant filed notice of appeal from this order on April 11, 1963. This is the instant appeal, No. 18714, appellant's third appeal to this Court.

III.

ERRORS SPECIFIED.

Appellant has specified the following points on appeal:

1. The District Court erred in applying an incorrect standard to determine the sufficiency of the evidence presented to the United States Commissioner.

2. The District Court erred in failing to find that the United States Commissioner abused his discretion in finding the evidence sufficient to certify petitioner-appellant extraditable and failing to find that there was no showing before the Commissioner of probable cause to believe that petitioner-appellant committed any offense within the treaty with the Republic of Mexico.

3. The District Court erred in failing to find either the matters presented before the United States Commissioner taken as a whole, establish that the statute of limitations of the Republic of Mexico had run on the offenses charged, or that the offenses charged against petitioner-appellant did not fall within the Extradition Treaty.

4. The District Court erred in failing to find that petitioner-appellant had been denied due process of law

and a fair hearing before the United States Commissioner by said Commissioner's refusal to authorize the taking of depositions in the Republic of Mexico.

IV.

STATEMENT OF THE FACTS.

Appellant lived in Poza Rica, Mexico, for 19 years, ending in 1959, when he moved to the United States [R. T. 291].[1] He was born in Mexico [R. T. 292].

He became superintendent of the Poza Rica district of Petroleos Mexicanos (hereinafter referred to as Pemex) in 1942 [R. T. 307]. Pemex is a decentralized public institution managing the oil resources of Mexico [R. T. 52-53].

The chief engineer at Poza Rica, Lopez Mata, was appellant's assistant [R. T. 478, 514]. Appellant selected the contractors upon various projects [R. T. 107]. Appellant's signature was the final signature to be placed upon these contracts for construction or improvements. Without his signature they were worthless [R. T. 488].

Appellant would later sign the payment vouchers after the work was completed [R. T. 534].

Carlos Osornio Morales was paid as contractor upon certain Poza Rica Pemex contracts which actually had been awarded to other "contractors," Alfonso Ortuno and Raul Govea. Ortuno and Govea signed the contracts [R. T. 98]. The work actually was performed by the workmen of Ladislao Gallegos [R. T. 98]. Osornio Morales told appellant how much had been expended for salaries and materials, and there were

[1] "R. T." refers to Reporter's Transcript of Proceedings.

about 9,000 or 10,000 pesos in the contract sum remaining, *of which appellant gave Osornio Morales 1,000 or 2,000 pesos* [R. T. 99-100]. The balance went to appellant for "social business, like the hospital *and others,*" but Osornio Morales had no way of knowing the final destination of that money [R. T. 99, 102-03]. Appellant had expressly ordered that Ortuno be listed as a contractor [R. T. 100, 109].

Appellant admitted receiving 10,000 pesos from Osornio Morales in cash, but claimed that it was a "contribution" for a hospital [R. T. 527-28]. He also admitted that contractors had paid 206,637 pesos to appellant's hospital committee under arrangements which clearly appear to have been "kick-backs" for the award of contracts [R. T. 542-48]. Appellant testified that his hospital committee paid out 1,269,626 pesos [R. T. 549].

When Lopez Mata heard that appellant had ordered that expenses for transportation of athletic teams be paid from contractor Manuel Porcel Blanco's Pemex contracts, he asked appellant about this. Appellant stated that this was true and added that Porcel Blanco should have the assistance of Pemex materials and labor to cover these amounts [R. T. 113-14].

One Mario Nuncio Gaona, manager of the Pemex basketball team, would determine the amounts of money needed for the team and then would look for *completed* Pemex projects of equivalent cost. He would be awarded contracts for these completed projects and would be paid "contract" sums to cover traveling expenses of the basketball team. Appellant would approve these expenses. The same procedures were em-

ployed for the managers of the football and baseball teams [R. T. 114].

Some false contracts between Pemex and Benito Berman were discussed by Armando Lopez Gonzalez and Lopez Mata, appellant's assistant. Lopez Mata said that the false contracts were necessary in order to cover embezzlements by a cashier. Appellant approved these contracts [R. T. 125, 128].

Appellant presented a witness, Roberto Taylor Robles, who testified that general manager Antonio J. Bermudez [R. T. 760-61] had authorized the use of Pemex equipment by workers on contracts [R. T. 765], but did not authorize use of Pemex materials or paint [R. T. 809].

The large mass of documentary exhibits introduced in evidence include numerous contracts involving alleged embezzlement of money, equipment (*i.e.,* use), materials, and labor.

V.
ARGUMENT.

A. Preliminary Considerations.

Appellee respectfully requests this Court's indulgence in considering, at this point, material somewhat repetitive of the discussion appearing in Appellee's Brief in Appeal No. 18271, a case set for hearing on the same date as the instant appeal.

Extradition rules differ from the ordinary rules of criminal procedure. This is because the proceeding involves the vital interest of a foreign sovereign, the obligation of the United States Government to the foreign sovereign, and the potential effect, as a precedent, upon the interest of the United States when,

with roles reversed, it may be seeking extradition. Solemn treaty obligations are involved which color every aspect of the proceeding.

In a unanimous decision the United States Supreme Court expounded upon the philosophy of extradition proceedings:

> "In the construction and carrying out of such treaties *the ordinary technicalities of criminal proceedings are applicable only to a limited extent.* Foreign powers are not expected to be versed in the niceties of our criminal laws, and proceedings for a surrender are not such as put in issue the life or liberty of the accused. *They simply demand of him that he shall do what all good citizens are required, and ought to be willing to do, viz., submit themselves to the laws of their country.* . . . Presumably at least, no injustice is contemplated, and a proceeding which may have the effect of relieving the country from the presence of one who is likely to threaten the peace and good order of the community *is rather to be welcomed than discouraged.*"
>
> *Grin v. Shine,* 187 U. S. 181, at 184-185 (1902) (Emphasis added).

Speaking for another unanimous court, Justice Holmes stated:

> "It is common in extradition cases to attempt to bring to bear all the factitious niceties of a criminal trial at common law. *But it is a waste of time.*"
>
> *Glucksman v. Henkel,* 221 U. S. 508, at 512 (1911) (Emphasis added).

In a later opinion the Supreme Court emphasized the effect of extradition proceedings upon the problem of reciprocity:

> "Considerations which should govern the diplomatic relations between nations, and the good faith of treaties, as well, require that their obligations should be liberally construed so as to effect the apparent intention of the parties to secure equality and reciprocity between them." (at p. 293). The Court added:
>
> "The obligation to do what some nations have done voluntarily, in the interest of justice and friendly international relationships, see 1 Moore, Extradition, § 40, should be construed more liberally than a criminal statute or the technical requirements of criminal procedure."
>
> *Factor v. Laubenheimer,* 290 U. S. 276, at 298 (1933).

B. The District Court Did Not Apply an Incorrect Standard to Determine Sufficiency of the Evidence.

Appellant contends that the District Court applied an incorrect standard to determine the sufficiency of the evidence presented to the United States Commissioner, because the Court stated that the test was "*whether there is any evidence warranting the finding of probable cause to believe the accused guilty.*" (Appellant's Op. Br. p. 15). (Emphasis added).

The quoted phrase correctly states the test in determining the validity of the finding that an accused is extraditable.

> *Fernandez v. Phillips,* 268 U. S. 311, at 312 (1925);

Bingham v. Bradley, 241 U. S. 511, at 516-17 (1916);

McNamara v. Henkel, 226 U. S. 520, at 523 (1913);

Cleugh v. Strakosch, 109 F. 2d 330, at 333 (9th Cir. 1940).

Speaking for a unanimous Supreme Court, Justice Holmes stated:

"The alleged fugitive from justice has had his hearing and habeas corpus is available only to inquire whether the magistrate had jurisdiction, whether the offense charged is within the treaty and, *by a somewhat liberal extension, whether there was any evidence warranting the finding that there was reasonable ground to believe the accused guilty.*"

Fernandez v. Phillips, supra, at p. 312 (Emphasis added).

"The question simply is *whether there was any competent evidence* before the commissioner entitling him to act under the statute. *The weight of the evidence was for his determination.*"

McNamara v. Henkel, supra, at 523 (Emphasis added).

"In this case, appellee never claimed or contended that the commissioner lacked jurisdiction, or that the crimes charged were not within the treaty. Hence, the sole question was, and is, whether there was *any evidence* warranting the finding that there was reasonable or probable cause to believe appellee guilty—not whether such evidence was sufficient, but whether there was any

such evidence. The sufficiency or insufficiency of such evidence was for the commissioner, not the court, to determine."

Cleugh v. Strakosch, supra, at p. 333.

Appellant bases his argument entirely upon the decision in *Townsend v. Sain,* 372 U. S. 293 (1963), which involves a habeas corpus federal court hearing regarding certain proceedings in a state court. There is nothing in the 5-4 *Townsend* decision which can be construed as an intention to silently overrule the repeated unanimous decisions of the Supreme Court in the field of international extradition, a subject far removed from the considerations underlying the philosophy of the majority in *Townsend.*

In the unlikely event that this Court should adopt appellant's contention and overrule the 9th Circuit decision in *Cleugh, supra,* en banc proceedings would presumably be required by the rule established in *Upton v. C. I. R.,* 283 F. 2d 716, at 723 (9th Cir. 1960).

C. The Evidence Warranted the Finding of Probable Cause to Believe That Appellant Had Committed an Embezzlement.

The evidence pointed directly to appellant's guilt. As superintendent of the Poza Rica district of Pemex [R. T. 307], he approved payment upon Pemex contracts for work that had already been completed [R. T. 114] and consequently was unnecessary. He approved false contracts for Benito Berman [R. T. 125, 128]. Some of the money which was to be officially paid to Manuel Porcel Blanco on contracts was diverted by appellant, allegedly to pay for transportation of Pemex athletic teams. To compensate for this, appellant or-

dered that Blanco use Pemex labor and materials on these contracts [R. T. 113-114]. The logical deduction from this fact is that Pemex was paying twice for the same work, once to the contractor and once to its own labor and for its own materials used on the job.

One fake "contractor," Carlos Osornio Morales, figured out how much he had expended in labor and materials upon his contract, and gave the entire balance to appellant. This was supposed to be a contribution for a hospital, but appellant returned 1,000 or 2,000 pesos to Osornio Morales, *who had done no work,* being a contractor in name only [R. T. 98-103, 527-28]. Appellant admitted that his hospital committee received 206,637 pesos from "contractors" under kick-back-type arrangements [R. T. 542-48]. Since at least some payments were made in cash [R. T. 527-28], there is no means of determining whether appellant embezzled the money by diverting it to an unauthorized use (e.g., hospital, etc.) or whether he embezzled a good portion right into his own pockets. The latter conclusion is more consistent with his payment of 1,000 or 2,000 pesos of Pemex money to Osornio Morales, perhaps to keep him quiet. However, as will be discussed subsequently, if appellant did divert all of the funds to the hospital and athletic teams without authorization, there would still be an embezzlement.

Appellant's argument, to the effect that there was insufficient evidence to establish the offense of embezzlement, is based almost entirely upon California law. However, the extradition treaty between the United States and Mexico (31 Stat. 1818, modified

in 44 Stat. 2409 and 55 Stat. 1133) does not refer to the substantive criminal law of the place of asylum. Under these circumstances, the law of the place of asylum is immaterial.

Factor v. Laubenheimer, 390 U. S. 276 (1933).

The treaty does refer to the law of the place of asylum. As the Supreme Court noted in *Factor, supra,* such a reference is to *procedural* law only.

Even if the *substantive* criminal law of the place of asylum could be applied under the Mexican-American treaty, which appellee does not concede, the applicable law would be *federal,* not the law of the state of California, since the alleged crime is a federal offense, embezzlement of national funds. Section 641 of Title 18, United States Code, would be much more appropriate than California Penal Code Sections 503 and 504, relied upon by appellant. On those occasions when extradition treaties refer to the substantive law of the place of asylum, this does not necessarily mean *state* law. If state law applied, there would be no extradition for such crimes as smuggling, counterfeiting, piracy, and mutiny upon the high seas, which appear in the Mexican-American extradition treaty (including modifications thereof).

Appellant's argument regarding embezzlement involves a number of sub-arguments:

(a) Appellant cites *Chappell v. United States,* 270 F. 2d 274 (9th Cir. 1959), indicating that there cannot be an embezzlement of labor. However, under California law, which appellant would apply, there may be an embezzlement of labor. In *People v. Holtzendorff,* 177 Cal. App. 2d 788, at 803-06 (1960), the

appellate court found an embezzlement where the defendant, a Housing Authority officer, caused public employees to type political campaign materials during working hours. Appellee would not apply California law, but it is noteworthy that the facts of the instant case are not limited to alleged embezzlement of labor. The evidence shows embezzlement of money, materials, and equipment (i.e., use, such as gasoline).

(b) Appellant cites *People v. Mills,* 41 Cal. App. 2d 260 (1940), as a case similar to his own case. In *Mills,* the defendant had authority to make advances or loans to members of his organization. Since he was a member, he logically believed that he had a right to make advances to himself. He did so and was later charged with embezzlement. Since he had a right to make the advances, he was not guilty. Appellant's case differs in one essential respect—appellant had no authority to play Santa Claus with Pemex money, regardless of whether his favorite charity was a baseball team or himself.

(c) Appellant argues that he was acting with authority. This self-serving statement was not consistent with his gift of 1,000 or 2,000 pesos of Pemex money to Osornio Morales [R. T. 98-103]. Roberto Taylor Robles, appellant's witness, testified that general manager Bermudez authorized use of Pemex equipment upon certain contracts (a very minor expense in the overall picture) but that he did not authorize use of Pemex materials or paint [R. T. 765, 809]. There are no indications, other than perhaps in appellant's testimony, that Bermudez authorized useless contracts for work already performed. The Commissioner could have disregarded appellant's self-serving testimony if

he disbelieved appellant. It should be added that if Bermudez had innocently authorized any of appellant's unusual activities, there would have been no need to employ the subterfuges of useless contracts and dummy contractors.

(d) Appellant argues that there was no diversion. The evidence shows that the money was diverted from authorized contractual purposes to other unauthorized places, *i.e.,* to contractors who did not fully perform their tasks, some or all of the money then going to appellant as "kick-backs," then being distributed by appellant in accordance with his own personal desires (*e.g.,* 1,000 or 2,000 pesos to Osornio Morales).

(e) The need to prove fraudulent intent is emphasized by appellant. Such intent may be implied from appellant's conduct in Poza Rica. This was a matter for the Commissioner to decide, since it involves a question of fact. Intent to defraud may be implied under Mexican law [R. T. 702].

(f) Appellant indicates a belief that the matter should fall within the federal "kickback" statutes and is therefore outside of the scope of the extradition treaty with Mexico. An analogous argument was rejected in *United States v. Mulligan,* 50 F. 2d 687 (2nd Cir. 1931), the appellate court holding (at p. 689) that the fact that other crimes were committed does not establish a defense to the crime actually charged in the extradition proceeding.

(g) Appellant argues that there could be no embezzlement because the funds were not entrusted to appellant or received by him or under his custody or in his possession. Appellant relies upon California law,

but in California there are only two essential elements of embezzlement:

> "The essential elements of embezzlement are the fiduciary relation arising where one intrusts property to another, and the fraudulent appropriation of the property by the latter."
>
> *People v. Gordon,* 133 Cal. 328, at 329 (1901), quoted with approval in:
>
> *People v. Talbot,* 220 Cal. 3, at 15 (1934);
>
> *People v. Holtzendorff, supra,* 177 Cal. App. 2d 788, at 806 (1960);
>
> *People v. Steffner,* 67 Cal. App. 23, at 28 (1924).

It is sufficient to show that the money was under the direction and management of the accused. " 'To constitute embezzlement it is not necessary to show actual possession of the money or property.' "

> *People v. Holtzendorff, supra,* 177 Cal. App. 2d 788, at 801 (1960).

In a similar situation an auditor, who approved unauthorized payments under warrants issued by the county treasurer, claimed that she was not guilty of embezzlement because she had no control over the money. The California Supreme Court rejected the argument:

> "One who is not in possession of money may have it under his control in the sense that it is under his direction and management. . . . It was the duty of the county treasurer to pay such a warrant, regular on its face, upon presentation, provided there were funds available therefor. Un-

> der such circumstances to say that the auditor had no control over the money of the county would exalt form and ignore substance."
>
> *People v. Knott,* 15 Cal. 2d 628, at 631 (1940).

Appellant is in the position of *Knott.* He signed the payment vouchers. The money was under his control, direction, and management.

Appellant contends that a Poza Rica superintendent cannot be guilty of embezzlement unless he is acting with the cashier, because the superintendent does not have access to the funds. This seems unreasonable in the light of the universal position of the cashier or disbursing clerk. He performs a non-discretionary clerical function, paying in accordance with documents received by him. The person authorizing the payment is the responsible party.

Appellant relies upon statements by expert witnesses to support his argument, but his own expert witness, Dr. Stern, testified [R. T. 706] that there may be an embezzlement of equipment. Thus, assuming appellant's unusual contention to be correct, the Commissioner nevertheless may have found an embezzlement of equipment under the facts of this case. However, it is not necessary to argue this point, because the other expert witness, Luis Araujo Valdivia, a faculty member of the law school of the University of Mexico [R. T. 28], testified that there could be an embezzlement although the funds were never received by the alleged embezzler [R. T. 254-55]. In the event of a conflict between the expert opinions of witnesses Valdivia and Stern, the Commissioner could have accepted the former's opinion and rejected the latter's.[2]

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[2]Dr. Stern had never studied law in any Spanish-speaking nations. [R. T. 591.]

(h) It is argued by appellant that expert witness Valdivia testified that money would not be "public funds" (and thus within the Mexican statute and the treaty) if a contractor was paid by Pemex and later contributed part of this money for a sporting activity, etc. However, Valdivia's testimony actually supported the Government's position on this point:

> "The price thus paid . . . does not belong to the contractor . . . when he returns to the employee that amount of money it continues to keep the quality of a public fund." [R. T. 250-51].

Furthermore, the embezzlement may take place at the time the money is delivered to the contractor by the cashier, rather than at the time of the contractor's "contribution" to the embezzler's favorite charity. This is too obvious to require citation of authority.

Expert Valdivia repeatedly testified that Pemex funds were subject to embezzlement as "public" funds [R. T. 71—see R. T. 52; R. T. 186, 201].

D. The Evidence Warranted the Finding of Probable Cause to Believe That Appellant Had Committed a Falsification.

There is some discussion of forgery in Appellant's Opening Brief, but appellant actually was never charged with forgery in this proceeding. He was charged in the Amended Extradition Complaint with "the crimes of falsification of the official acts of the Government or public authority and the uttering and fraudulent use of the same. . . ." Since forgery

was not charged, the following cases cited by appellant are immaterial:

People v. Bendit, 111 Cal. 274 (1896);

Pasadena Investment Company v. Peerless Casualty Company, 132 Cal. App. 2d 328 (1955);

People v. Valdes, 155 Cal. App. 2d 613 (1957).

In regard to the falsification allegation, appellant contends that he could not be guilty of the crime of falsification because Pemex was not a governmental agency, authority, or corporation. This argument apparently does not apply to the embezzlement charge, because both experts testified [Valdivia at R. T. 69, 71; Stern at R. T. 663] that Pemex employees could commit the crime of embezzlement under the statute in question.

Since the charge reads in the disjunctive (falsification of the official acts of the Government *or* public authority), it would be sufficient to prove falsification of the official acts of government. Valdivia testified [R. T. 249] that the crime of falsification would be committed under the facts of the instant case. Appellant's witness, expert Stern, cited a Pemex case in which the Mexican Supreme Court found a crime of falsification [R. T. 663-64]. Thus it is evident that Pemex acts are acts of "government."

Appellant argues that Pemex is not a governmental agency or authority, although his own expert witness testified that Pemex was a "public service" [R. T. 662-64] and a "public institution" [R. T. 601, 623, 649]. He stated that Pemex is equivalent to the American Red Cross (Appellant's Op. Br. p. 29), while expert Valdivia testified that Pemex is analogous to

the Tennessee Valley Authority and the Atomic Energy Commission [R. T. 60]. The Commissioner could take his choice.

It is contended that appellant was not a public officer. However, the actual testimony concerning this matter is concerned with a technical term appearing in a special law which does not apply to decentralized agencies [R. T. 216, 267, 650, 683, 684], *e.g.,* Pemex.

E. The Statute of Limitations Had Not Expired.

Appellant contends that the statute of limitations expired, citing an Article 113 containing a one-year statute of limitations. This argument must fail for each of the following reasons:

(1) Appellant relies upon a statute having nothing to do with the facts of the instant case. His own expert witness, Dr. Stern, testified that the statute of limitations would be *three* years, so there would be no problem in the instant case [R. T. 727]. Article 113 involved dereliction of official duties and had nothing to do with embezzlement of public funds [R. T. 727, 732] and nothing to do with the Mexican Penal Code [R. T. 726-27], which contains the criminal statutes involving the instant case.

(2) In absence of treaty provision, the statute of limitations may not be raised in extradition proceedings.

Hatfield v. Guay, 87 F. 2d 358, at 364 (1st Cir. 1937);

First National City Bank of New York v. Aristeguieta, 287 F. 2d 219, at 227 (2nd Cir. 1960).

The Mexican-American extradition treaty does not mention the Mexican statute of limitations. It does mention the statute of limitations of the place of asylum:

Article III:

"Extradition shall not take place in any of the following cases:

"1. . . .

"2. . . .

"3. When the legal proceedings or the enforcement of the penalty for the act committed by the person demanded has become barred by limitation according to the laws of the *country to which the requisition is addressed.*" (Emphasis added).

The statute of limitations upon federal crimes in the United States is five years (non-capital offenses). Title 18, *United States Code,* Section 3282. The statute does not extend to fugitives. Title 18, *United States Code,* Section 3290.

California has no statute of limitations for prosecution for murder, embezzlement of public moneys, and falsification of public records.

California Penal Code, Section 799.

F. The Alleged Embezzlement Offense Was Within the Extradition Treaty.

It is argued by appellant that the offense of embezzlement as alleged was not within the Mexican-American extradition treaty, because embezzlement could only be committed by someone who was not a public functionary, public official, or public employee. This is again a play upon words, based upon a defini-

tion of specific terms in the Law of Responsibilities of Functionaries. It would be something like taking a definition out of the California Government Code (*e.g.,* "public official") and attempting to apply it to a similar term (*e.g.,* "public funds") in the Penal Code. Both experts testified [Valdivia at R. T. 69, 71; Stern at R. T. 663] that Pemex employees could commit the crime of embezzlement with which appellant is charged.

G. Due Process of Law Was Not Denied by the Refusal to Authorize the Taking of Depositions in Mexico.

Appellant contends that he was denied due process of law by the Commissioner's refusal to "authorize" the taking of depositions in Mexico. This subject is the sole topic in Appeal No. 18271 and appellee's 23-page brief therein. Appellee will not burden the Court with a complete recital of all arguments contained in its brief in Appeal No. 18271, but will summarize its position insofar as it is applicable to the instant appeal:

(1) The Commissioner had no authority to compel the taking of depositions in Mexico. His "authorization" would have had no legal effect. Appellant would have had to rely upon volunteers, which could be done just as well without the "authorization."

(2) An accused in extradition proceedings has no authority to present testimony taken by deposition outside of the United States.

Oteiza y Cortes v. Jacobus, 136 U. S. 330, at 336-37 (1890).

(3) Errors in rejecting evidence at an extradition hearing do not render the detention illegal.

Collins v. Loisel, 259 U. S. 309, at 316 (1922).

(4) The requested depositions would have involved unreasonable delays in the proceedings.

Appellee's arguments are presented in much greater detail in appellee's brief in Appeal No. 18271, to which the attention of the Court is respectfully requested.

Appellant relies heavily upon the recent decision in *Brady v. Maryland,* 373 U. S. 83 (1963), but *Brady* involved a trial, not a probable cause hearing.

The precise point raised by appellant was considered by the Supreme Court in *Oteiza, supra,* but appellant states that *Oteiza* "was decided prior to the Japanese Immigrant Case, 189 U. S. 86 (1903) indicating that aliens were entitled to due process." (Appellant's Op. Br. p. 40). Actually, the decision that aliens are entitled to due process was made *before Oteiza.*

Yick Wo v. Hopkins, 118 U. S. 356, at 369 (1886).

H. Summary.

It is respectfully submitted that the order of the District Court should be affirmed if there was *any* evidence warranting the finding of probable cause to believe appellant guilty of *either* offense charged, or even if there was *any* evidence warranting a finding of probable cause to believe appellant guilty of any portion of the alleged embezzlements. The sufficiency of the evidence is for the Commissioner to determine.

Cleugh v. Strakosch, supra, at p. 333.

Appellant maintains that the money was used for the benefit of Pemex:

> "Mr. Merino you must answer for the fact that while as superintendent of Pemex you permitted some of the profits involving contracts with that company to come back to it for its own use and benefit rather than limiting contracts to persons who were willing to and did pocket all of the proceeds for their own private uses." (Appellant's Op. Br. p. 24).

It is not possible, of course, to present a detailed account showing the exact beneficiaries of appellant's share-the-wealth program. Such matters as his payment of 1,000 or 2,000 pesos of someone else's money to Osornio Morales are not the type of activities likely to be carried out in a public marketplace at high noon. We do not know how many Osornio's there were, just as we do not know whether appellant received large "kick-backs" when he distributed 1,269,626 pesos through his hospital committee. Accepting, for purposes of argument only, a contention that appellant poured all of the appropriate funds back into Pemex (including trips for favored athletes), there still would be an embezzlement. Could an official of the County of San Diego send a few favored employees on a pleasure jaunt to Europe at county expense (a morale benefit to county employees) without Board of Supervisors approval and then approve their travel pay without committing a crime? Taking appellant's example, shouldn't the Government of Mexico be allowed to decide what to do with the money from lucrative oilfields (*e.g.*, national defense, national welfare pro-

grams), rather than let it go to a few people in one community called Poza Rica?

Appellant obviously benefitted in a social sense from his misuse of government money (see appellant's Exhibit N, the "Campo Deportivo Ingeniero Jaime J. Merino" baseball park). The evidence also points to a personal financial benefit, although such is not required in order for an embezzlement to occur.

It is respectfully submitted that the Order of the District Court should be affirmed.

Respectfully submitted,

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Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

PHILLIP W. JOHNSON

No. 18716

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ROBERT ARRAIGA,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Cases

Statutes

No. 18716

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ROBERT ARRAIGA,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

I.

JURISDICTIONAL STATEMENT.

On December 12, 1962, the Federal Grand Jury for the Southern District of California, returned an indictment in two counts charging in count one that the appellant, Robert Arraiga and his codefendant, Carlos Manriquez conspired to receive, conceal, transport and facilitate the concealment and transportation of heroin in violation of Title 21 of the United States Code, Section 174. Count two charged that the codefendant Manriquez knowingly and unlawfully received, concealed and facilitated the concealment and transportation of the heroin which was the subject of Count One. [C. T. 2-4.][1]

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[1]C. T. refers to the Clerk's Transcript of Record.

On December 26, 1962, the appellant and his co-defendant were arraigned before the Honorable William M. Byrne and both parties entered pleas of not guilty. The Court then ordered the case transferred to the Honorable Harry C. Westover for all further proceedings. [C. T. 5.] Subsequently, the case was re-transferred to the calendar of the Honorable Leon R. Yankwich, and on February 12, 1963, the Court heard the trial of the matter without a jury. On the same date the Court found the appellant and his codefendant guilty with respect to count one. Manriquez, the only party charged in the second count, was found not guilty as to count two. [C. T. 6.]

On March 11, 1963, both defendants were present with their counsel in the courtroom of Judge Yankwich and, following argument by counsel and statements by Arraiga and Manriquez, both of the defendants were sentenced to the custody of the Attorney General for a period of five years. [C. T. 7.]

A timely Notice of Appeal was filed by the appellant Robert Arraiga on March 20, 1963. [C. T. 9.] The appellant then applied to the District Court for an order permitting an appeal *in forma pauperis* and this petition was acted upon favorably on April 3, 1963. [C. T. 14.]

The jurisdiction of the United States District Court was conferred by Section 2131 of Title 18, United States Code. The jurisdiction of the Court of Appeals to entertain this matter is set forth in Title 28, United States Code, Sections 1291 and 1294.

II.
STATEMENT OF THE FACTS.

At the onset, it is important that the reader of this brief be made aware of a relatively small geographical area in the eastern portion of the City of Los Angeles, California. A reading of the record reveals that the appellant's co-defendant Carlos Manriquez resided at 941 South McBride Street in Los Angeles. [R. T. 3.] This street runs north and south and is bounded on the west by Duncan Street and on the east by McDonnell Street. [R. T. 41, 42.] The record does not reveal, nor are we concerned with, the street which intersects McBride Street to the north of the Manriquez residence. To the south the first intersecting street is Verona Street, the next is Olympic Boulevard and the last is Telegraph Road. [R. T. 43.] The latter thoroughfare parallels a freeway and, as a consequence, the McBride Street—Telegraph Road intersection takes the form of a T. [R. T. 34.]

With the above in mind, we turn to a consideration of the record which reveals that officers of the California and Federal Narcotic Agencies were aware that Carlos Manriquez was engaged in the narcotics traffic. [R. T. 57.] In an effort to develop further information relative to the involvement of Manriquez, the officers determined that they would maintain a surveillance of his home. By pre-arrangement, Dennis Cook and William Stoops, deputy sheriffs assigned to the narcotic detail of the Los Angeles Sheriff's Office, met with Jacques Kiere, an agent of the Federal Bureau of Narcotics. This meeting occurred immediately north of Telegraph Road on McBride Street at approximately 6:45 P.M. on the evening of November 13, 1962. [R. T.

39, 78.] At that time Agent Kiere joined the state officers in their vehicle which was specifically designed for the purposes of surveillance. The vehicle was a panel truck with the panel portion completely enclosed and small holes bored in the paneling so that surveillance could be maintained from the unseen portion of the truck. [R. T. 39, 63.]

At their meeting point Officers Kiere and Stoops took up positions within the panel portion of the truck and Officer Cook assumed the driver's seat. [R. T. 39.] Cook then drove north on McBride Street intending to find a vantage point from which the officers could observe the Manriquez home. The officers circled the 900 block fruitlessly on two occasions and were in the process of passing Manriquez' residence for the third time when they noted the suspect backing from his driveway in a 1953 Chevrolet. [R. T. 14, 29.] Cook passed the residence headed in a northerly direction and observed the defendant Manriquez to back his otherwise unoccupied car onto McBride Street and drive to the south. [R. T. 31.] Officer Cook immediately pulled into an alley, turned around and followed Manriquez southbound on McBride Street. The surveillance was interrupted as the defendant Manriquez' vehicle made the signal at Olympic and McBride and the agent's truck was stopped by a red light. [R. T. 40.] When they again had the right of way Deputy Cook chose to turn left to the adjoining McDonnell Street, inasmuch as there were no other cars on McBride Street and the officer did not want to call attention to his vehicle. After traveling one block on McDonnell Street to Telegraph Road, the government vehicle turned to the right on Telegraph Road and proceeded west. As they passed

the northwest corner of Telegraph Road and McBride Street, Officer Cook noted that the defendant Manriquez was on foot immediately along side of a boulevard stop sign which is approximately two feet from a fire hydrant; both the sign and hydrant were in a grassy area bordering the paved sidewalk. At the moment that the vehicle passed the corner, Officer Cook noticed the defendant Manriquez make a "bending or stooping motion" with his left hand extended in the area between the stop sign and fire hydrant. [R. T. 41.] Cook proceeded west driving at approximately 25 m.p.h. and traveled a short block to Duncan Street; there he made a u-turn and returned east on Telegraph Road. As he proceeded eastbound, Cook observed Manriquez walk onto the wide sidewalk corner in question; this is about ten feet from the stop sign—hydrant area. Cook continued in the eastern flow of traffic for about two more blocks and then made another u-turn and stopped momentarily for a brief conversation with his fellow officers. He then proceeded westbound once more on Telegraph Road. As he approached the northwest corner of McBride and Telegraph, Cook noticed that Manriquez and his 1953 Chevrolet were gone; however, he saw what appeared to be the defendant's car northbound on McBride Street. Cook continued to drive to Duncan Street and there made a right-hand turn. At Olympic Cook again saw the 1953 Chevrolet. [R. T. 42.] The agents' vehicle crossed Olympic and made a right-hand turn onto Verona Street, which is the first street north of Olympic. As Cook's vehicle reached the intersection of Verona and McBride, he noted Manriquez pulling into his driveway. Cook turned right onto McBride and drove south until he reached a point

some 50 feet north of Telegraph. At this time Cook parked the panel truck, exited it and walked to the northwest corner of Telegraph and McBride; there he observed a crumpled Pall Mall package in the grassy area between the stop sign and the hydrant. It was the only debris in view and Cook stopped to retrieve it. The package was found to contain two heroin filled rubber condrums which were turned over to Federal Narcotics Agent Kiere. [R. T. 43.] Approximately 5 to 6 minutes had elapsed between the time the officers had last seen Manriquez on the corner and 7:05 P.M. when the cigarette package was retrieved. [R. T. 44.]

In observing the area in and about the corner where the narcotics were found, the officers noted that there were no street lights on the corner but there was sufficient illumination inasmuch as there was a rather constant flow of traffic on Telegraph and a street light on the opposite side of Telegraph. Additionally, there was considerable light afforded by the traffic on the nearby freeway. [R. T. 34, 38, 75.]

After discovering the contraband, the agents drove their truck to a surveilling position on the west side of McBride Street. The vehicle was parked faced to the south about 100 feet from Telegraph. Three-quarters of an hour passed and no one appeared; as a consequence, Cook started his vehicle and began to drive from the curb. Just as he did this, Cook observed a 1960 or 1961 light blue Thunderbird pull to the curb on the north side of Telegraph Road, some 30 to 40 feet from the corner where the narcotics had been recently discovered. [R. T. 45.] As the government vehicle entered the intersection, Cook saw the appellant

Arraiga alight from the Thunderbird and walk in the direction of the northwest corner of McBride and Telegraph. Officer Cook continued his turn and entered the eastbound lanes of traffic. As soon as possible, the law enforcement vehicle made a u-turn and headed back towards Arraiga. As Cook passed McBride Street he observed Arraiga walk past the stop sign on the corner in question and look to his rear towards the east and then to the north up McBride Street. Again the officer made a u-turn at Duncan Street and returned with the traffic in an eastern direction. As the officers passed the northwest corner this time; Arraiga was observed to be on one knee, apparently feeling in the grass with his hands in an approximate 2 foot wide area immediately between the stop sign and the fire hydrant. [R. T. 46, 48.] The officers' vehicle continued on Telegraph to McDonnell Street and again made a u-turn. As their vehicle headed west once more, it was observed that Arraiga's automobile was gone; as a consequence, the officers' car continued to Duncan Street, made a right hand turn and drove to Olympic Boulevard. As they turned east onto Olympic, Cook saw Arraiga walking across McBride to a gasoline station on the southeast corner of McBride and Olympic. At the time the panel truck passed McBride Street, Cook observed Arraiga's Thunderbird on the west side of McBride and headed to the south. He saw Arraiga enter a telephone booth on the gas station lot. The officers continued on Olympic for a block or so and then turned around and parked on the northern curb of Olympic. At this time field glasses were used to maintain further surveillance. [R. T. 51.] A close observation revealed that Arraiga was no longer in the booth.

Cook then drove to McBride and turned left in the direction of Telegraph Road. As Cook drove down McBride, he observed the Thunderbird to pull to the west curb and Cook immediately brought the government vehicle to the curb. When he had completed parking, Cook looked again to the Thunderbird but did not see anyone. Some 5 minutes later Cook observed Arraiga walk towards his car, enter it and drive away. [R. T. 52.] In attempting to follow Arraiga's car, Cook lost contact and did not discover this for a mile or more. When he realized his error, Cook turned about and returned to McBride and Telegraph. Upon arriving at the intersection Cook observed the blue Thunderbird again; Arraiga was still driving and Manriquez was his passenger. Cook continued to drive past McBride Street to the next block west, at this point Deputy Stoops left the vehicle in order that he might take up a position of surveillance from an area southwest of the McBride Street corner. Cook turned right on Duncan Street and right again on Olympic and McBride so that he could maintain observation of the defendants from a position north of them on McBride Street. Cook's view was somewhat obstructed but he did see both the men leave the car and walk to the corner; there the officer observed Manriquez stop and look in the area between the fire plug and stop sign. Officer Cook then noted that Arraiga was standing in the gutter bordering the grassy area where Manriquez was standing. [R. T. 53.]

In the meantime Stoops had located two truck-trailers parked on Telegraph Road approximately 75 to 100 feet from McBride Street. The officer crawled under the east most truck and thereby gained an unob-

structed view of the corner. From this position Stoops saw Arraiga crossing McBride Street towards the east. Manriquez was observed to be standing near the stop sign on the northwest corner of McBride Street. [R. T. 99.] As Arraiga walked to the east, Manriquez took up a squatting position and move his hands in the area between the hydrant and sign. [R. T. 100.] About a half-minute passed and Manriquez regained the standing position and followed Arraiga. Manriquez joined his companion in front of the Wayside Inn, a bar located in the middle of the block east of McBride. [R. T. 101.] Arraiga then entered the bar and Manriquez remained on the sidewalk in front. Minutes later Arraiga reappeared and joined Manriquez; at this time the two men stood conversing for several minutes. Once again they parted and Manriquez returned to the northwest corner of McBride as Arraiga re-entered the bar. Upon arriving at the corner Manriquez again searched the area around the fire plug.

After another brief search Manriquez returned to the sidewalk outside the bar and was there met by his associate. The two men then returned to the corner. [R. T. 101.] When they arrived, Arraiga walked in the gutter on the west side of McBride Street and looked towards the ground as he approached his parked car. Manriquez again stopped in the area where the officer had recovered the Pall Mall package and viewed the ground as he walked to the side of Arraiga. When both men reached their car they entered it and drove away. [R. T. 102.]

Both parties were apprehended by the officers the following week. The defendants were not together when they were arrested and during the course of a

routine interview after Arraiga's apprehension he was asked by Deputy Cook if he knew Manriquez; Arraiga stated that he did not. [R. T. 137.] Cook then asked if Arraiga knew a man named "Nero" *i.e.,* an alias of Manriquez, and when the appellant did not respond, Cook further identified Manriquez as "[T]he guy that lives at 941 on McBride." Again the officer received a negative answer.

III.

ARGUMENT.

I.

The Evidence Did Establish the Existence of a Criminal Conspiracy.

The subject of criminal conspiracy has been discussed in numerous law articles and cases, consequently, it would only belabor the point to treat conspiracy extensively in this brief. Suffice it to say, that the cases seem to be in accord that:

> "[T]he gist of the offense of conspiracy . . . is an agreement among the conspirators to commit an offense attended by an act of one or more of the conspirators to effect the object of the conspiracy . . ."

United States v. Falcone (1940), 311 U. S. 205, 210, 61 S. Ct. 204, 85 L. Ed. 128. See also *Pettibone v. United States* (1892), 148 U. S. 197, 13 S. Ct. 542, 37 L. Ed. 419 and *Marino v. United States* (9 Cir. 1937), 91 F. 2d 691.

As indicated by the above definition there need be proven only one overt act in furtherance of the con-

spiracy and the commission of this act, albeit by one conspirator, is binding upon the others. *Rose v. United States* (9 Cir. 1945), 149 F. 2d 755 and *Marino v. United States, supra.*

On page twenty-eight of his opening brief the appellant frames his objection to the conviction by stating that the United States failed to prove that he received, concealed, *et cetera* the narcotics upon which the prosecution was premised. Additionally, the appellant contends that the record does not reflect an agreement between Arraiga and Manriquez to violate the narcotic laws.

In answer to the first argument the Government would cite the Court to its recent decision in *Twitchell v. United States* (9 Cir. 1963), 313 F. 2d 425, 429 where the Court in discussing a conspiracy stated:

> ". . . We have in mind the established rules that it is not necessary to show that the substantive offense was actually committed (*Goldman v. United States,* 1918, 245 U.S. 474, 477, 38 S. Ct. 166, 62 L. Ed. 410; *Marino v. United States,* 9 Cir. 1937, 91 F.2d 691, 696, 113 A.L.R. 975) . . ."

In light of this citation it can be seen that it is not incumbent upon the prosecution to prove the substantive crime which is the object of the conspiracy in order to sustain the conspiracy conviction.

As to the second portion of the appellant's argument, this actually centers about the question as to whether there was sufficient evidence to warrant a conviction. Although the following citation is from a civil case in another circuit, it is particularly illuminative of the

framework within which the Court must appraise this contention of the appellant.

> "We need not advert to citation of authority that under the procedure prescribed for the United States Courts, the function of deciding all questions of fact is that of the jury or, in the absence of a jury trial, that of the trial court and that this rule has its reason and foundation not only in the Constitution but also in the fact that those who see and hear witnesses are much better equipped to weigh the evidence and determine the credibility to be extended to those testifying than are the judges of the courts of review who do not enjoy the same advantages . . ."
>
> *Jennings v. Murphy* (7 Cir. 1952), 194 F. 2d 35 at 36.

In implementing the above considerations the test utilized by this Circuit in determining whether sufficient evidence has been proven was recently voiced in *David Farrell, et al. v. United States* (August 7, 1963), No. 18,241 and *Longino Castro v. United States* (August 2, 1963), No 18,396. In the former case at page six the Court stated:

> "The decisions reveal two tests which are applied in determining the sufficiency of either direct or circumstantial evidence to support a jury verdict. The verdict of the jury must be sustained if there is substantial evidence when viewed in the light most favorable to support the judgment. *Glasser v. United States,* 315 U.S. 60 (1942); *Williams v. United States,* 273 F.2d 781 (9th Cir. 1959), C.D. 362 U.S. 951; *Robinson v. United States,* 262 F.2d 645 (9th Cir. 1959); *Miller v.*

United States, 302 F.2d 659 (9th Cir. 1962). The verdict of a jury must be sustained if reasonable minds as triers of the fact, could find that the evidence excludes every reasonable hypothesis but that of guilt. *Remmer v. United States,* 205 F.2d 277 (9th Cir. 1953). See also: *Bolen v. United States,* 303 F. 2d 870 (9th Cir. 1962)."

In viewing the facts which were before the trial Court it should be kept in mind that the actions of Arraiga and Manriquez were apparently uninhibited as they were unaware that the law enforcement officers were maintaining a surveillance of their activities. Those facts indicative of a criminal conspiracy are: (1) On the evening in question, Officer Cook saw the defendant Manriquez making a "bending or stooping motion" with his left hand extended in the area between a stop sign and fire hydrant at the northwest corner of Telegraph Road and McBride Street. No one was with Manriquez. (2) Some five to six minutes later Cook retrieved an apparently empty Pall Mall package from the area between the hydrant and sign. This package contained heroin. (3) Approximately 45 minutes later the appellant pulled to the curb on the west side of Telegraph Road. He was alone and walked immediately to the corner in question. (4) The appellant was then observed to be on one knee in the grassy area between the fire plug and street sign, and appeared to be searching the area with his hands. (5) Arraiga left the area minutes later and by his own admission he thereafter placed a phone call to Manriquez. (6) After completing the call, Arraiga again drove to the northwest corner of McBride and Telegraph and was seen to leave his car in the area. (7) Arraiga termi-

nated this visit some 5 minutes later and was not observed again for about 20 minutes. When seen again the appellant was driving his car and had Manriquez as his passenger. (8) Arraiga parked his car at the McBride corner and was observed to look in the gutter area abutting the ground between the hydrant and sign. At the same time Manriquez was searching the grassy area. (9) Manriquez continued to look as Arraiga entered a nearby bar. (10) A short time later both men again combed the area before leaving. (11) Upon questioning by the arresting officers, Arraiga stated he knew no one by the name of Carlos Manriquez, nor did he know anyone nicknamed "Nero", *i.e.,* an alias of Manriquez. Arraiga further stated that he did not know anyone residing at 941 South McBride Street. At trial the appellant stated he had been to the home of Carlos Manriquez on several occasions and knew him by that name and by the alias of "Nero". (12) The appellant stated at trial that he had parked on McBride and walked via the northwest corner of McBride and Telegraph to the Wayside Inn on Telegraph Road. The testimony of the agent revealed that the appellant parked on Telegraph near the bar, yet he walked immediately to the corner where the narcotics had been cached. (13) Finally, there is the ludicrous story of the appellant that the only reason he was in the area was in order that he might meet a girl whom Manriquez knew and in the course of his activities the appellant lost his watch crystal in the approximate area where the officers discovered the heroin.

It is the position of the appellee that in view of the above evidence there was considerable material upon which the trial Court, utilizing the tests voiced in the *Farrell* case, could find the appellant guilty.

II.

The Trial Court Was Not in Error in Its Understanding of the Degree of Proof Required to Convict the Appellant of Criminal Conspiracy.

It should be kept in mind that:

> ". . . there has been a long and consistent recognition that the commission of the substantive offense, and a conspiracy to commit it are separate and distinct offenses . . . A conspiracy to commit a crime is a different offense from the crime that is the object of the conspiracy . . ." [citations omitted]. *Blumenthal v. United States,* (9th Cir. 1947), 158 F. 2d 883, 887, affirmed 332 U. S. 539, 68 S. Ct. 248, 92 L. Ed. 154; sustained 331 U. S. 799, 67 S. Ct. 1306, 91 L. Ed. 1824; sustained 332 U. S. 856, 68 S. Ct. 385, 92 L. Ed. 425.

Recognizing this progression of offenses, if you will, and applying this concept to the instant case it can be seen that it may well take a different quantum of proof to carry the crime out of the conspiracy stage and into the actual substantive offense. This is all the trial Court meant when it said:

> "As to the evidence, I take it as axiomatic that it takes less to prove a conspiracy than it takes to prove a substantive offense." [R. T. 152.]
>
> . . .
>
> "That does not follow because it takes less to convict a man of conspiracy than of a substantive offense." [R. T. 161.]

We are essentially engaged in a question of semantics and lest there be any doubt as to the degree of proof

or the standard of proof applied by the trial judge, we would refer this Court to the statement of Judge Yankwich when he acquitted the Defendant Manriquez of substantive crime charged in count two.

> "I will tell you what I will do on Count Two I believe there is a *reasonable doubt* which exists, and I will find him not guilty as charged in Count Two of the Indictment." [R. T. 153.] Emphasis added.

From this statement it is obvious that the Court utilized the concept of reasonable doubt in determining criminal liability.

III.

The Entitlement of the Indictment Is Not Controlling.

A review of the indictment under which the appellant was convicted reveals that the entitlement charges a violation of the general conspiracy statute as set forth in Title 18, United States Code, Section 371. [C. T. 2.] However, the body of the first count charges a conspiracy to violate "21 United States Code, Section 174." Furthermore, the phrasing of this count utilizes the wording of the code in proscribing a conspiracy to traffic in narcotics in violation of Title 21, United States Code, Section 174. Though such an oversight on the part of the Government is not to be condoned, it certainly cannot be said that the appellant was prejudiced in his defense of this case, nor was the trial Court misled as witnessed by the following statements:

> "I want to call the attention of the United States Attorney to the fact that they continue in these cases to put in the wrong section, and while, of

course, the section is not binding on the court, the fact remains that conspiracy as to narcotics is not governed by . . .

. . .

"Section 371, which is the regular conspiracy section. It is governed by Section 174. Somebody may make a mistake because there is a great difference.

"Section 371 is the general conspiracy statute and the penalty is not more than five years.

"Section 174, Title 21, is a special section applicable to narcotics, and the penalty is a minimum of five years.

"So we are dealing with entirely different sections. It is one of the few instances where a conspiracy is separately Section 174, Title 21, says, 'Whoever fraudulently', and so forth, 'conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty', punished.

"The other one applies to general conspiracy.

"I have called the attention of the deputies here dozens of times—they just use the old form and probably, because some day some judge will not look at the section, he will sentence a man and impose an illegal sentence under the conspiracy statute." [R. T. 156, 157.]

In support of its position in this matter the United States looks to the case of *Stillman v. United States* (9th Cir. 1949), 177 F. 2d 607, 611 where this Court stated:

". . . The cases make it clear that the caption is not a controlling factor and that erroneous

recitals therein do not vitiate an indictment; furthermore, that a distinction must be drawn between the body (the charging part) and its caption." [Citations omitted.]

See also:

Williams v. United States (1897), 168 U. S. 382, 389, 18 S. Ct. 92, 42 L. Ed. 509.

IV.

Conclusion.

On the facts in this record and the law applicable thereto, for the reasons stated herein, the judgment entered against appellant Robert Arraiga is free from error and should be affirmed.

Respectfully submitted,

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Certificate.

I certify that, in connection with the preparation of this Brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing Brief is in full compliance with those rules.

William D. Keller

Nos. 18718, 18719

In the United States Court of Appeals for the Ninth Circuit

W. WILLARD WIRTZ, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, APPELLANT

v.

WESTERN COMPRESS COMPANY, APPELLEE

W. WILLARD WIRTZ, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, APPELLANT

v.

FEDERAL COMPRESS AND WAREHOUSE COMPANY, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

BRIEF FOR APPELLANT

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INDEX

CITATIONS

Cases:

In the United States Court of Appeals for the Ninth Circuit

No. 18718

W. Willard Wirtz, Secretary of Labor, United States Department of Labor, appellant

v.

Western Compress Company, appellee

No. 18719

W. Willard Wirtz, Secretary of Labor, United States Department of Labor, appellant

v.

Federal Compress and Warehouse Company, appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

BRIEF FOR APPELLANT

STATEMENT OF JURISDICTION

These two actions were brought by the Secretary of Labor under Section 17 of the Fair Labor Standards Act [1] to enjoin further violations of the overtime pro-

[1] Act of June 25, 1938, c. 676, 52 Stat. 1060, as amended, 29 U.S.C. 201 *et seq.* The Fair Labor Standards Amendments of 1961 (75 Stat. 65) were not in effect at the time this litigation was commenced.

visions of Section 7 of the Act (R. 1–6). The actions were consolidated for hearing and submitted on cross-motions for summary judgment, based on a record consisting of stipulations and a deposition (R. 44, 46, 48). The court below granted appellees' motions (R. 50–57) and entered judgments for appellees accordingly on January 11, 1963 (R. 58–61). Notices of appeal were filed on March 8, 1963 (R. 62, 64), and a motion to consolidate these actions for purposes of appeal was granted by this Court, which has jurisdiction to review the judgments below under 28 U.S.C 1291 and 1294(1).

STATEMENT OF FACTS

Appellees operate plants in which they engage in storing, warehousing, compressing, handling and shipping cotton (R. 12, 27). They acknowledge that virtually all of the cotton which they store or compress is shipped outside the state (R. 20, 35), and admit that their employees are not being paid in accordance with the overtime provisions of the Act (R. 24, 34). However, appellees contend, and were upheld by the district court, that all of their employees, regardless of the duties they perform, are exempt from the overtime requirements by virtue of Section 7(c) of the Act, which provides that "[i]n the case of an employer engaged * * * in the ginning and compressing of cotton", the overtime requirments of the Act "shall not apply to his employees in any place of employ-

ment where he is so engaged."[2] The sole issue on this appeal is whether this exemption for "compressing" extends to the warehouse storing of cotton in appellees' plants.[3]

According to the parties' stipulations cotton is received by appellees in bales from various cotton gins in the area. A portion of such cotton (approximately

[2] The full text of Section 7(c) reads:

"In the case of an employer engaged in the first processing of milk, buttermilk, whey, skimmed milk, or cream into dairy products, or in the ginning and compressing of cotton, or in the processing of cottonseed, or in the processing of sugar beets, sugar-beet molasses, sugarcane, or maple sap, into sugar (but not refined sugar) or into sirup, the provisions of subsection (a) shall not apply to his employees in any place of employment where he is so engaged; and in the case of an employer engaged in the first processing of, or in canning or packing, perishable or seasonal fresh fruits or vegetables, or in the first processing, within the area of production (as defined by the Secretary), of any agricultural or horticultural commodity during seasonal operations, or in handling, slaughtering, or dressing poultry or livestock, the provisions of subsection (a), during a period or periods of not more than fourteen workweeks in the aggregate in any calendar year, shall not apply to his employees in any place of employment where he is so engaged." [29 U.S.C. 207(c)]

[3] It was stipulated (R. 25, 35) that any of appellees' employees engaged in storing activities may qualify for the 14 week overtime exemption which Section 7(b)(3) provides for industries found by the Wage and Hour Administrator "to be of a seasonal nature" since the Administrator has found the "warehousing of cotton" to be a seasonal industry. (Wage Hour Manual (B.N.A.) 91:1555.) This exemption, of course, does not apply to overtime workweeks in excess of 14 in any one year.

15% in the case of Western and approximately 50% in the case of Federal [4]), designated as "in transit" or "C.I.T." cotton, is compressed and shipped immediately upon receipt, or, depending upon the work load, within an average period of one to four days (R. 17, 30, 77). No warehouse receipts are issued on such cotton, and no storage fees are charged (R. 17, 30). The handling of "in transit" or "C.I.T." cotton is concededly an exempt activity under Section 7(c) and, as indicated *infra,* pp. 22–23, any temporary storing which such cotton undergoes is considered as simply incidental to its compressing.

However, it is the Secretary's position that activities relating to the storage of the remaining 85% of the cotton handled by Western and 50% of the cotton handled by Federal are not within the exemption provided by Section 7(c). Such cotton is placed in warehouse storage upon arrival at appellees' facilities. Warehouse receipts are issued and storage charges are imposed in accordance with appellees' published tariffs. (R. 14, 20, 28, 32.) Such cotton remains in storage for varying periods until such time as the owner may issue a shipping and pressing order. During a one year test period, over a third of the cotton warehoused by appellees had been in storage for over four months (R. 19, 36, 38, 41). Some 10% of this cotton is already compressed to standard density when it reaches appellees' warehouses, and one-half of this amount is subsequently further compressed by defendants to high

[4] These percentages are derived from the figures stipulated to by the parties and found at R. 19, 36, 38, 40.

density (R. 53). Approximately five percent of the cotton handled by defendants leaves their warehouses after storage without being compressed at all by them (R. 53).

Of the four plants involved in this litigation (three belonging to Federal and one to Western), by far the greater portion of the premises of each is devoted to warehouse storage of cotton rather than to compressing. Federal's plants consist of from six to eight warehouses each, plus an office building, a garage, a power house, and some residences; only one warehouse in each plant is utilized (and only in part) for compressing, while the others are devoted entirely to storing (R. 27–29). Western's plant consists of one office building and a warehouse building which is divided into twelve compartments. Only one compartment in the latter building is used for compressing; the others are solely for storing (R. 13).

The employees who are the subject of this litigation are engaged at defendants' facilities in such activities as receiving, unloading, sampling, tagging and weighing cotton, moving cotton into and out of storage compartments, operating the various presses, and moving cotton to the shipping docks. Others are engaged in the office buildings in clerical and typing work. While they have specific job classifications, employees, other than clerical and typing, may be assigned to work outside their classifications (R. 22, 23, 33). Thus, it was stipulated that when the compress machinery is in operation the press crews work exclusively in compressing activities (R. 22, 33);

709-176—63——2

while during the active cotton receiving season employees normally assigned to compressing and related activities are assigned as needed to receiving cotton for storage and moving cotton to the storage compartments (R. 23, 33).

In his deposition testimony Western's President, Mr. Dellinger, stated that the purpose of compressing is to effect savings in freight rates (R. 76). He also pointed out the different purposes for which cotton is stored: to await favorable market conditions, to await the arrival of other cotton to fill out a shipment, or to await a buyer (R. 80–81, 88–89).[5] While Mr. Dellinger asserted that he considered Western to be in the compressing business, not the storage business (R. 81, 89, 99), he admitted that Western had obtained a license to operate a warehouse under Arizona law (R. 87), and that his company stored cotton for hire, and he acknowledged that "to that extent" Western was in the storage business (R. 99–100, 89). It was stipulated that Western receives approximately 40% of its gross income from its storage business (R. 20), and Federal 33% (R. 32).

DECISION BELOW

The court below concluded that the Section 7(c) exemption applies "to all of the employees on the

[5] According to Mr. Dellinger much of the cotton stored is "loan cotton" upon which the Commodity Credit Corporation has guaranteed the farmer a minimum price by extending him a non-recourse loan, allowing the farmer to repossess the cotton if market conditions warrant such a course (R. 79–80). If the market declines the cotton will be stored for "some time" (R. 89. See also R. 15, 30).

premises" of appellees (R. 54), regardless of whether the employees engage in the operation specifically named therein as exempt. In so holding the court considered as factually distinguishable cases holding that Section 7(c) "does not exempt industries from the overtime provisions of the Act, but only the specific processes therein mentioned", and that "[t]he term 'place of employment' as used in Section 7(c) of the Fair Labor Standards Act means those portions of the plant devoted by the employer to the [specified] operations". *Fleming* v. *Swift & Co.*, 41 F. Supp. 825, 831 (N.D. Ill., 1941), affirmed 131 F. 2d 249 (C.A. 7), and *Shain* v. *Armour,* 50 F. Supp. 907, 911 (W.D.Ky., 1943).

SPECIFICATION OF ERRORS

The court below erred:

(1) In concluding that the exemption in Section 7(c) extends to all employees on the premises without regard to the particular activities performed by them or to the portion of the premises in which they work.

(2) In granting appellees' motions for summary judgment and denying appellant's motion for summary judgment.

ARGUMENT

Appellees' employees who are engaged in whole or in part in the storing of cotton are not within the exemption for "compressing" of cotton provided by section 7(c).

Section 7(c), so far as relevant here, provides that

"[i]n the case of an employer engaged * * * in the ginning and compressing of cotton * * * [the overtime provisions of the Act] shall not apply to his employees in any place of employment where he is so engaged." The section does not refer to the storing of cotton, but appellees contend that the exemption is applicable to the storing as well as the compressing activities of their employees, and the court below agreed.

It is settled that a claim to an exemption from this Act is a matter of affirmative defense and that the employer must show plainly and unmistakably its applicability. *Arnold* v. *Ben Kanowsky, Inc.,* 361 U.S. 388; *Consolidated Timber Co.* v. *Womack,* 132 F. 2d 101, 106 (C.A. 9). In attempting to meet this burden appellees rely on two basic propositions: (1) that if an employer is engaged in an activity specified in Section 7(c) as exempt—in this case "compressing"—the exemption extends to all of his employees regardless of their particular activities; and (2) that in any event the storing of cotton is simply a necessary incident to compressing.

As we demonstrate below, the first proposition, which appears to be the one upon which the district court based its decision, is directly contrary to the decided cases, which establish that Section 7(c) applies only to employees engaged in activities enumerated in the exemptive language or in activities necessary thereto, and that such work must be performed in those portions of the premises devoted to such enumer-

ated activities. The second proposition (which the district court regarded as "extremely persuasive" (R. 55–56)) is incompatible, we submit, with the text of the statute, the legislative history, the longstanding administrative interpretation acquiesced in by Congress, and the established rules of statutory construction.

A. The Section 7(c) exemption applies only to those employees engaged exclusively in an activity specified in Section 7(c) or in work which is a necessary incident of such an activity, performed in a portion of the premises devoted to that activity.

1. ***Employees whose duties relate in whole or in part to activity other than compressing are not within the Section 7(c) exemption for compressing.***

Contrary to the district court's interpretation of Section 7(c), the courts have consistently adhered to the view that "the application of this exemption is determined by the nature of the duties performed by the employees" (*Walling* v. *Bridgeman-Russell,* 2 Wage Hour Cases 785, 790, 6 Labor Cases ¶61,422 (D. Minn., 1942, not officially reported), and that "to come within the exemption of this provision it is necessary that the work of the employees be confined to [the specified] operations" (*Domenico* v. *Mitchell,* 232 F. 2d 112, 114 (C.A. 10)). Accord: *Fleming* v. *Swift & Co.,* 41 F. Supp. 825, 831 (N.D. Ill., 1941), affirmed 131 F. 2d 249 (C.A. 7); *Shain* v. *Armour,* 50 F. Supp. 907, 911 (W.D. Ky., 1943); *Walling* v. *DeSoto Creamery & Produce Co.,* 51 F. Supp. 938, 941 (D. Minn., 1943); *Hammonds* v. *J. W. Broom & Sons,* 195 F. Supp. 504, 509 (W.D.N.C., 1961).

The reason for this construction of Section 7(c) was aptly set forth in *Armour & Co., supra,* where, in rejecting the employer's contention that this exemption applied to all of its employees because an activity specified as exempt therein represented the major (though not the entire) portion of the work performed in the place of employment, the court stated:

> This contention presents a strict and technical construction of the words used in Section 7(c) of the Act, which in the opinion of this Court is entirely inconsistent with the fundamental purpose of the Act and with the common sense interpretation which would have to be employed in dealing with any company engaged in several various kinds of activities. [50 F. Supp. at 910] [6]

Application of the foregoing view of Section 7(c)'s scope is well illustrated by the Tenth Circuit's *Domenico* decision, *supra,* where the employer's handling, processing, packing and loading of fresh vegetables

[6] The same principle has been applied to the other so-called "employer" exemptions in the Act. *Walling* v. *Connecticut Co.*, 154 F. 2d 552 (C.A. 2), involved employees engaged in the production of electric power for use by their employer in his exempt business as an electric railway carrier. Though Section 13(a)(9) exempts "any employee" of such an employer, it was held not to apply to those employees because the power they produced was used in operating nonexempt instrumentalities of interstate commerce as well as the exempt electric railway. See also *Northwest Airlines* v. *Jackson*, 185 F. 2d 74 (C.A. 8), certiorari denied 342 U.S. 812. There, the exemption in Section 13(b)(3) for "any employee of a carrier by air" was held not to apply to employees of such a carrier whose duties related to modification of planes for the Government.

received from local sources constituted "first processing"—which, like cotton compressing, is an exempt activity under Section 7(c). However, the employer's packing and unloading of "mountain grown" vegetables in the same areas of its establishment was held not to be an exempt activity, since such vegetables had already been "first processed" elsewhere. Accordingly, the court concluded that "since Domenico's employees work on both first processed fruits and vegetables and on mountain grown vegetables, he is entitled * * * to claim no exemption under Section 7(c)" (232 F. 2d at 116).[7]

Similarly, in *Shain* v. *Armour & Co.*, 50 F. Supp. 907 (W.D. Ky., 1943), it was held that operations in defendant's creamery department in testing, cooling, cutting and packaging butter churned elsewhere and brought into the plant in tubs were not within the exemption of Section 7(c), although the same opera-

[7] Having applied the principle that the Section 7(c) exemption did not apply to activities which are not specified in the exempting provision, the court's denial of the exemption for employees engaging in both activities follows from the well established rule that the performance of both exempt and nonexempt activities by an employee in the same workweek results in the loss of the exemption. See, *e.g.*, *Mitchell* v. *Hunt*, 263 F. 2d 913 (C.A. 5); *Tobin* v. *Blue Channel Corporation*, 198 F. 2d 245, 248 (C.A. 4); *Wabash Radio Corporation* v. *Walling*, 162 F. 2d 391, 394 (C.A. 6); *Anderson* v. *Manhattan Lighterage Corp.*, 148 F. 2d 971 (C.A. 2), certiorari denied 326 U.S. 722; *North Shore Corporation* v. *Barnett*, 143 F. 2d 172, 175 (C.A. 5); *McComb* v. *Puerto Rico Tobacco Marketing Co-op Ass'n.*, 80 F. Supp. 953, 957 (D.P.R. 1948), affirmed 181 F. 2d 697 (C.A. 1).

tions, when performed on butter churned in the plant, would be an exempt activity under Section 7(c) as part of the first processing of cream into dairy products. The court pointed out that Section 7(c) "does not exempt industries as a whole from the overtime provisions of the Act, but only those processes therein mentioned" (50 F. Supp. at 911, 913).[8]

To the same effect are *Walling* v. *Bridgeman-Russell Co.,* 2 Wage Hour Cases 785, 6 Labor Cases ¶ 61,422 (D. Minn., 1942, not officially reported) (similar facts and same holding as related to creamery department in *Shain* v. *Armour, supra*); *Fleming* v. *Swift,* 41 F. Supp. 825 (N.D. Ill., 1941), affirmed on other grounds 131 F. 2d 249 (C.A. 7) (the court concluding that Section 7(c) places "a functional limitation on the classes of employees for whom an exemption from the overtime provisions may be claimed" (41 F. Supp. at 831) and therefore ruling that only those employees of certain processing departments who were engaged exclusively in occupations which are a necessary part of the processing operations specified in Section 7(c) would be within the exemption); *Walling* v. *DeSoto Creamery & Produce Co.,* 51 F. Supp. 938, 943 (D. Minn., 1943) (holding that employees in defendant's poultry proc-

[8] With respect to Armour's poultry department, the court similarly held that the handling, slaughtering, and dressing of poultry are within the Section 7(c) exemption, but that work performed on poultry in this department after it is dressed is not. Accordingly, it was concluded that since most poultry department employees combined these exempt and nonexempt activities, they would not be exempt. (50 F. Supp. at 911–912)

essing plant engaged in grading, packing and loading, and employees handling nonexempt eggs were not exempt "because said Section 7(c) does not provide an industry exemption but only an exemption for those employees engaged in the specified operations"—in this case, handling, slaughtering and dressing poultry); *Hammonds* v. *J. W. Broom & Sons,* 195 F. Supp. 504, 509 (W.D. N.C., 1961) (where the court, while concluding that defendant's business "comprised one establishment" nonetheless held the Section 7(c) exemption inapplicable to an employee who performed nonexempt milling work as well as exempt cotton ginning work.).

See also *Libby, McNeill & Libby* v. *Mitchell,* 256 F. 2d 832 (C.A. 5), where the court, in contrasting the respective reaches of the Section 7(c) and the Section 7(b)(3) overtime exemptions, considered "of extreme importance" the fact that "under Section 7(c) the exemption applies only to those *employees* engaged in [an enumerated activity]—whereas Section 7(b)(3), on the other hand, extends the exemption to "any employee * * * if such employee is * * * employed in * * * an industry" (256 F. 2d at 834; emphasis, the court's).

The construction placed upon Section 7(c) by the foregoing decisions has never been contradicted by other judicial authority. That such construction must be considered to accord with the Congressional intent seems evident from the fact that when Congress in 1961 extensively revised the Fair Labor Standards Act it not only made no change in the language of

709-176—63——3

Section 7(c), but the Committee reports of both Houses, in defining the scope of this exemption, applied precisely the same construction: "Under Section 7(c), exemption depends upon *the employee's engagement in particular work* in a place of employment where his employer is so engaged in the named operation" (Sen. Rep. No. 145, 87th Cong., 1st Sess., pp. 36–37; H. Rep. No. 75, 87th Cong., 1st Sess., p. 25; emphasis added).

Of the cases cited to support the above construction of Section 7(c) the opinion of the court below considered only two—the *Swift* and *Armour* decisions, both of which the court apparently felt were distinguishable from the instant situation as not involving the intermingled performance of exempt and nonexempt work. In the instant case, the court stated, there is no way to tell from the manner in which an employee handles a bale of cotton or the place he stores it whether it is intended for immediate compressing or prolonged storage, and, moreover, the employer might not know until after the event which bales had been handled for such purpose (R. 54–55). It is clear, however, that both the *Swift* and *Armour* decisions, as well as other decisions cited herein, *supra,* pp. 9–13, did in fact involve the intermingled handling of exempt and nonexempt goods in a manner fully comparable to that involved here.[9]

[9] In *Armour* the court expressly pointed out that employees of the creamery department performed duties relating to both butter churned in the plant and butter brought in from outside and concluded that "such employees as devote part of their time during the workweek to duties other than the first processing of cream into butter are not exempt under the

Moreover, not only is there no warrant for concluding that difficulty of distinguishing between exempt and nonexempt work serves to preclude application of the general rule established for such cases (see fn. 7, *supra,* p. 11), but the fact is that the record in this case reveals no such difficulty as is suggested by the court below in distinguishing between exempt and nonexempt activity. To the contrary, it was stipulated between the parties that "in transit" or "C.I.T." cotton, which is to be immediately compressed and which is generally shipped out within one to four days, arrives at appellees' plants preceded by pressing and shipping orders from the merchants who have already contracted for its sale and delivery (R. 17–18, 30). Since all other cotton arrives at the

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Act" (50 F. Supp. at 911). With respect to poultry department employees the court likewise indicated that exempt and nonexempt work was intermingled, stating that "in most instances employees engaged in handling, slaughtering, and dressing operations combin[ed] exempt and nonexempt operations" so that "few, if any, would be exempt to any extent" (50 F. Supp. at 911–912). Similarly, it is clear that the court in *Swift* was dealing with intermingled activities since its conclusions of law provide that Section 7(c) exemption applies only to one who during any workweek "is working exclusively in an occupation which is a necessary part of the handling, slaughtering or dressing of livestock" (Concl. 8, 41 F. Supp. at 831), and, further, that "an employer may not claim an exemption for any employee under Section 7(c) if the employee during any part of the workweek for which the exemption is claimed does any work which does not fall within the scope of the exemption" (Concl. 11, 41 F. Supp. at 832. See also, in particular, the *Domenico* decision (232 F. 2d 112)) which the district court did not mention, but where, as we have discussed above, pp. 10–11, employees were quite plainly engaged in the intermingled handling of exempt and nonexempt vegetables.

plants with warehouse receipts issued therefor, and is placed in storage until such time as pressing and shipping orders may be received, there would seem to exist a ready distinction between the non-exempt handling of storage cotton on the one hand, and the exempt handling and compressing of "in transit" cotton and compressing of storage cotton on the other. The fact that appellees find it convenient or preferable to at times engage their employees interchangeably in exempt and non-exempt activity—just as, *e.g.,* the *Domenico* employees were engaged in handling both exempt and nonexempt vegetables and the *Armour* employees were engaged in working on both exempt and nonexempt butter and in performing both exempt and nonexempt poultry operations—establishes that the same result should be reached here as was reached in those and other cases cited above, pp. 9–13.

2. Employees who perform work in areas not devoted to compressing activities are not within the Section 7(c) exemption for compressing.

We submit further that the court's extension of the exemption "to all of the employees on the premises" (R. 54) is precluded by the fact that Section 7(c) is, on its face, limited to employees working in a "place of employment where he [the employer] is so engaged," *i.e.,* where he is engaged in a specified activity, in this case "compressing." Bearing in mind that each of Federal's premises consists of an office building and six to eight warehouse buildings, only one of which (and that only in part) is used for compressing, and that Western's premises consists of an office building and a warehouse, only one compart-

ment of which is used for compressing (R. 13, 27–29), it seems clear that the entire premises of each appellee cannot reasonably be deemed the "place" where each is engaged in "compressing". Such a view would leave no role at all for the restrictive phrase "where he [*i.e.,* the employer] is so engaged". To give this phrase meaning and effect, it must be read to limit the exemption to employees working "in" the particular "place" in which the employer is actually engaged in compressing.

And the courts have so held. In *Fleming* v. *Swift,* 41 F. Supp. 825 (N.D. Ill., 1941), affirmed 131 F. 2d 249 (C.A. 7), the employer was engaged in acquiring and slaughtering livestock and in the processing, manufacturing, and distributing of meat, meat products, and by-products. In applying Section 7(c) to this establishment the court carved out for exemption only those departments of the plant in which the operations specified in the section ("handling", "slaughtering" and "dressing") were performed, holding that the portions of the plant devoted to those operations constituted the "place of employment", and that employees in other, even though related, departments (such as those devoted to meat-curing) were not within the scope of the exemption. (As already pointed out, *supra* p. 12, the court also held that the exemption applied only to the employees in such departments who were engaged solely in the specified work.) Similarly in *Walling* v. *De-Soto Creamery & Produce Co.,* 51 F. Supp. 938, 943 (D. Minn., 1943), one basis for the court's holding that employees of a poultry processing plant engaged

in grading, packing and loading were not within Section 7(c)'s exemption for "handling, slaughtering and dressing" of poultry, was that "grading, packing and loading are not performed in any place of employment where he [the employer] is so engaged; to wit, the killing and picking room". See also *Walling* v. *Bridgeman-Russell Co.,* 2 Wage Hour Cases 785, 6 Labor Cases ¶ 61,422 (D. Minn., 1942, not officially reported), where the court pointed out, in connection with a claim for Section 7(c)'s "first processing" exemption:

> "The term 'place of employment' * * * *means those portions of an establishment devoted by the employer to 'first processing' operations.* The * * * exemption is applicable to any employees who perform exclusively the operations described in this section, and any employees who though not engaged in 'first processing' operations, are engaged exclusively in occupations which are a necessary part thereof and *perform such duties in those portions of the premises.* (2 Wage Hour Cases at 790, emphasis supplied).

Since appellees maintain separate portions of their facilities, even separate buildings, for storage and compressing purposes, the situation here is essentially no different from that involved in the *Swift* case where the exemption was held limited to those particular portions of the plant devoted to "slaughtering" and "dressing" operations, or in the *DeSoto Creamery* case where the poultry dressing rooms, though closely related in terms of sequence of operation, were held to be a separate "place of employ-

ment'' from the cooling and packing rooms. We submit, therefore, that it is incompatible with the terms of the exemptive provision to extend it to employees working in appellees' separate office buildings where its general clerical work is performed, or in areas devoted solely to warehousing.

B. The Warehouse Storing Activities in Appellees' Establishments Are Not "Compressing" Within the Meaning of Section 7(c).

We turn now to appellees' contention that regardless of the above discussed limitations on the scope of Section 7(c), the relationship between compressing and storing is such that the term ''compressing'' is to be regarded as including those storing activities carried on by the employer.

We submit that this contention is not tenable in the light of the legislative history, which shows a clear Congressional intent to exclude storing from the scope of the exemption. In accordance with that legislative history, it has been the expressed administrative position almost from the beginning that storing is not exempt as an incident of ''compressing''—a consistent, long-standing interpretation which Congress has never repudiated and has in effect ratified. In these circumstances, we submit, the appellees have failed to meet the burden laid upon them by the established principle of statutory construction which requires that exemptions from this Act be narrowly construed and applied only to persons plainly and unmistakably within their scope.

It is clear from the legislative history that the question of extending the exemption of Section 7(c) to storing was the subject of explicit Congressional

attention, and that storing was deliberately excluded from its scope. In an earlier version of the bill, recommended by the House Committee on Labor, the corresponding provision extended this overtime exemption to both "compressing and storing". H. Rep. No. 1452, 75th Cong., 1st Sess., page 3. In addition, an amendment was proposed during the debates in the House, entirely exempting, among others, "any person employed in connection with the ginning, compressing and storing of cotton" (82 Cong. Rec. 1776). A similar amendment was also proposed in the Senate exempting "cotton compresses, cotton warehouses, cotton ginning and baling" (81 Cong. Rec. 7887). Congress, however, rejected all of these proposals, and instead selected the specific operations of "ginning" and "compressing" for overtime exemption.

In contrast, in Section 13(a)(10) which gives a complete exemption for specified activities performed within a limited "area of production", Congress expressly specified "storing" as well as "compressing." [10]

This difference between the wording of the Section 7(c) exemption and that of Section 13(a)(10) serves further to demonstrate the inapplicability of Section 7(c) to the storing of cotton, for it is settled that the

[10] Section 13(a)(10) reads in full as follows:

"Section 13(a) The provisions of sections 6 and 7 shall not apply with respect to—

* * * * *

"(10) any individual employed within the area of production (as defined by the Secretary), engaged in handling, packing, storing, compressing, pasteurizing, drying, preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market, or in making cheese or butter or other dairy products;".

Act's several exemptions relating to agriculture must be read together as a unified "congressional scheme" (*Maneja* v. *Waialua Agricultural Co.,* 349 U.S. 254, 268), and that "all the sections relating to exemptions are *in pari materia* and must be construed together to form a consistent whole, if possible" (*Bowie* v. *Gonzalez,* 117 F. 2d 11, 17 (C.A. 1)). Thus in *Maneja,* the Supreme Court reasoned that the specific inclusion of sugar milling in Section 7(c), as well as its omission from mention in Section 13(a)(10), "marks the outer limits of Congressional concession to this type of processing" and therefore "requires us to hold that sugar milling is outside the agriculture exemption" of Section 13(a)(6). 349 U.S. at 268–269.

The Supreme Court's reasoning in *Maneja* accords with that applied in the earlier Eighth Circuit decision in *Stratton* v. *Farmers Produce Co.,* 134 F. 2d 825, where the question was whether the processing of poultry could be impliedly read into Section 13(a)(10). It was concluded by the court that "[t]he enumeration in Section 7(c) of [the handling and processing of poultry] as a separate classification from 'the first processing * * * of any agricultural or horticultural commodity' * * * would seem quite definitely to indicate that the handling or packing of poultry * * * was not intended to be included in the term 'handling, packing, * * * of agricultural or horticultural commodities for market' under the exemption of Section 13(a)(10)" (134 F. 2d at 827).

This same approach was elaborated in *Bowie* v. *Gonzalez,* 117 F. 2d 11 (C.A. 1), which involved the question of whether the processing of sugar cane was

exempt under Section 13(a)(10). The First Circuit noted that while sugar cane processing was specifically mentioned in Section 7(c) it was not mentioned in Section 13(a)(10). It compared this situation with that of "cotton ginning" which was mentioned specifically in both, and reasoned that the presence of a specified activity in one provision and its absence in the other clearly indicated an intention to limit the exemption to the former (117 F. 2d at 19). It concluded that it "cannot be important that sugar processing is similar to those operations included in Section 13(a)(10), as Section 7(c) is ample evidence of the fact that Congress had sugar processing in mind and knew how to include it when it so desired" (*ibid.*). So in the instant case Congress' inclusion of "storing" in Section 13(a)(10) is "ample evidence" of the fact that Congress had storing in mind and "knew how to include it when it so desired."

In the light of this legislative history, the Wage-Hour Administrator ruled at the outset that "the storing of cotton, either before or after compressing is not * * * included in the term 'ginning and compressing cotton' in Section 7(c)." Interpretative Bulletin No. 14, Section 16, originally issued August 21, 1938, reissued in December 1940 (B.N.A. Wage and Hour Manual, 1940 ed., at p. 162, and all subsequent editions). The Administrator has consistently applied this interpretation in his enforcement of the Act throughout the years. In 1958 he clarified further that storing would not be exempt as "necessary incidents" to compressing, except for "transit storage or similar temporary storage of cotton awaiting compressing,

or awaiting loading out after compressing" (23 Fed. Reg. 8119, Oct. 22, 1958, 29 C.F.R. 780.953).

The reasonableness of this administrative interpretation is particularly evident from the facts of the instant case, which demonstrate clearly the functional and economic distinctiveness and separateness of the warehousing and compressing activities carried on by the appellees.

Thus appellees are licensed to engage in the business of warehousing as operators of bonded storage facilities (R. 14, 35). Their published tariffs list separate fees for storage and for compressing (R. 26, 43). They distinguish between cotton delivered to them for storage and cotton "in transit" which is delivered for immediate compressing (but which may require temporary storage while awaiting the compressing operation, or while awaiting shipping out after compressing), by issuing warehouse receipts only in the case of the former (R. 17, 30). The storage cotton is kept for extensive periods of time, well over one-third of it being stored for more than four months (R. 19, 36, 38, 41). Of necessity, it is stored in areas separate from that where the compress machinery is located (R. 13, 27–29). According to appellees' figures, 40% of Western's gross income and 33% of Federal's is received for storage as distinguished from compressing (R. 20, 32). Admittedly, the two services rendered by appellees to their customers serve different needs. The customer engages the appellees' compressing services in order to effect savings in transportation costs (R. 76). He may, in addition, engage the appellees' warehousing services,

when and to the extent that they are needed to meet his merchandising and shipping problems; *i.e.,* if he wishes to wait for favorable price conditions, or for the accumulation of a sufficient stock of like quantity to make up a particular shipment (R. 88, 89). These are obviously distinct services; and each is available to the customer separately as may be needed by him. About 50% of the cotton handled by Federal, and 15% of the cotton handled by Western, is compressed without warehousing (R. 19, 36, 38, 40); and, while warehoused cotton is normally compressed before leaving, approximately five percent of such cotton is not compressed by the appellees (R. 53).

It should, moreover, be pointed out—and this consideration further attests to the soundness of the administrative position—that an interpretation which would relieve warehouses with compress equipment of all obligation to pay overtime wages in accordance with the Act, would accord such warehouses a distinct advantage as against those warehouses, apparently of generally smaller size,[11] which do not possess such equipment—a result which Congress cannot be readily assumed to have intended. As was stated in *Walling* v. *Connecticut Co.,* 62 F.Supp., 733, 735 (D. Conn.,

[11] A standard text on the cotton industry characterizes the two types of warehouses as follows:

"There are two types of warehouses in the Cotton Belt. One of these types is the small outlying local warehouse. Such warehouses are without compresses and are about 1,150 in number. The other type is the large warehouse having much storage space, ample shipping connections, and equipped with compresses. There are about 305 of these establishments." (Harry Bates Brown, *Cotton*, McGraw-Hill Book Company, New York, 1958, p. 442.)

1945), affirmed 154 F. 2d 552 (C.A. 2), in connection with a claim to another exemption under this Act:

> If the employer regularly and substantially engages in an otherwise nonexempt business other than the one for which the exemption was designed, however, strict construction of the exemption requires that it be not extended to that other business merely because the principal business of the employer is exempted. To do so would hardly be fair to those who must compete in that other business as their major activity.

We submit, therefore, that the consistent administrative position is right, and that it is at the least entitled to great weight as part of "a body of experience and informed judgment" in a class with the interpretive determinations of this and many other administrative authorities which have been "given considerable and in some cases decisive weight", *Skidmore* v. *Swift,* 323 U.S. 134, 140—all the more so because it represents the earliest "contemporaneous construction of [the] statute by the [authority] charged with the responsibility of setting its machinery in motion, of making the parts work efficiently while they are yet untried and new". *United States* v. *American Trucking Associations,* 310 U.S. 534, 539.

Moreover, it is evident from subsequent legislative developments that Congress has acquiesced in and in effect ratified the interpretation of the Administrator. During the hearings which preceded the enactment of the 1949 Amendments, at which time the Congress undertook a comprehensive consideration of the provisions of the Act and the interpreta-

tions which they had been given, the Administrator's position regarding the scope of the "compressing" exemption in Section 7(c) was called to the attention of the Labor Committees of both Houses by a spokesman for the National Cotton Compress and Warehouse Association (Hearings before the House Committee on Education and Labor on H.R. 2033, 81st Cong., 1st Sess., p. 916; Hearing before a Subcommittee of the Senate Committee on Labor and Public Welfare on S. 58, *et al.,* 81st Cong., 1st Sess., p. 675). The spokesman, John H. Todd, protested to these Congressional committees that:

> Each successive Administrator of the Fair Labor Standards Act has interpreted and applied the exemptions contained in Section 7(c) and 13(a)(6) and 13(a)(10) for the ginning, compressing, and warehousing of cotton, and has interpreted the phrase 'area of production' of agricultural and horticultural commodities, as used in the Section 7 and Section 13 (a)(10) exemptions, in a manner calculated to restrict the application of those exemptions to the fewest possible number of persons.
>
> For example, whereas the section 7(c) exemption from overtime in the ginning and compressing of cotton says that the maximum hours and overtime provisions shall not apply to the employees of an employer engaged in the ginning or compressing of cotton at any place of employment where he is so engaged, the Administrators have consistently interpreted that exemption as applying *only to those employees in cotton gins and in compress-warehouse plants actually working on or at the*

> *machines which gin or compress the cotton.* Those Administrators have maintained that the exemption is not applicable to persons performing the interrelated functions essential to the operation of ginning and compressing plants. (Emphasis added.)[12]

On the basis of these hearings, Congress re-enacted Section 7(c) with an amendment extending the scope of its exemption to "the first processing of buttermilk" (63 Stat. 913), but not changing the language which was the subject of the protested administrative interpretation. This negative response to the protest of the industry thus brought into play the principle frequently applied by the Supreme Court and succinctly stated by it in *Brewster* v. *Gage,* 280 U.S. 327, 337, thus:

> The substantial reenactment in later Acts of the provision theretofore construed by the department is persuasive evidence of legislative approval of the regulation. National Lead Co. v. United States, 252 U.S. 140, 146; United States v. Cerecedo Hermanos y Compania, 209

[12] The spokesman for the Association did, to some extent, misstate the administrative position which has always recognized that activities truly incidental to the exempt operation are within the exemption. Thus, in the Administrator's Release R–1892, dated January 1943 and published in 1944–1945 Wage Hour Manual at page 574, it was explained that Section 7(c) was generally applicable to employees "whose activities are a necessary incident to the described operations, and who work solely in those portions of the premises devoted by their employer to the described operations." With particular reference to "compressing" the earlier Interpretative Bulletin No. 14 had specifically cited "the receiving and weighing of the lint, both before and after compressing" as an exempt part of the compressing operation.

U.S. 337, 339; United States v. G. Falk & Brother, 204 U.S. 143, 152.

To the same effect, see *Helvering* v. *Reynolds Co.,* 306 U.S. 110, 114–115, and *National Labor Relations Board* v. *Gullett Gin Co.,* 340 U.S. 361, 366.

Moreover, not only did Congress reenact this section without any change to meet the opposition to the administrative position here in question, but it also expressly declared, in Section 16(c) of the Amendments, that existing administrative interpretations, not inconsistent with the Amendments, "shall remain in effect."[13] Section 16(c) thus provides a "unique imprimatur" to pre-1949 administrative interpretations (*Libby, McNeill & Libby* v. *Mitchell,* 256 F. 2d 832, 837 (C.A. 5)), and has been relied upon by the Supreme Court in upholding a number of such interpretations of the Act: *Alstate Construction Co.* v. *Durkin,* 345 U.S. 13, 16–17; *Maneja* v. *Waialua Agriculture Co.,* 349 U.S. 254, 270; *Steiner* v. *Mitchell,* 350 U.S. 247, 255; *Mitchell* v. *Kentucky Finance Co.,* 359

[13] Section 16(c) of the Fair Labor Standards Amendments of 1949, 63 Stat. 920, 29 U.S.C. 208 note (1958 ed.), provides:

"Any order, regulation, or interpretation of the Administrator of the Wage and Hour Division or of the Secretary of Labor, and any agreement entered into by the Administrator or the Secretary, in effect under the provisions of the Fair Labor Standards Act of 1938, as amended, on the effective date of this Act, shall remain in effect as an order, regulation, interpretation, or agreement of the Administrator or the Secretary, as the case may be, pursuant to this Act, except to the extent that any such order, regulation, interpretation, or agreement may be inconsistent with the provisions of this Act, or may from time to time be amended, modified, or rescinded by the Administrator or the Secretary, as the case may be, in accordance with the provisions of this Act."

U.S. 290, 292. The interpretations outstanding in the first two of these cases were sustained even though they represented changes in an earlier position. The interpretation in issue here, however, not only represents the earliest contemporaneous construction of this provision, but it has been consistently adhered to. Since it is plainly not inconsistent with the 1949 Amendment, the *Alstate* and *Waialua* rulings apply *a fortiori* here.

If there remained any substantial doubt as to the applicability of Section 7(c) to appellees' storage activities, the well settled principle of strict construction of the exemptions from this Act would plainly require resolution of that doubt against the claim of exemption. This Court was one of the first to caution "that the Act is remedial and that persons claiming to come within exemptions therein must bring themselves within both the letter and spirit of the exceptions, which are subject to a strict construction." *Consolidated Timber Co.* v. *Womack,* 132 F. 2d 101, 106. The Supreme Court has added that the claimants must do so "plainly and unmistakably". *Arnold* v. *Ben Kanowsky,* 361 U.S. 388, 392; *Phillips Co.* v. *Walling,* 324 U.S. 490, 493.

We submit that it is far from plain and unmistakable that the appellees have brought their storage operations within the exemption for "compressing". It is, on the contrary, plain from the text of the exemption, the decided cases, and the legislative history—let alone the consistent and undisturbed administrative interpretation since the enactment of the statute—that there is no exemption in Section 7(c)

for warehousing, and that storage operations are exempt only if they occur in the period immediately preceding or following compressing and are necessary to permit the cotton to take its turn at the compress or to await transportation out of the plant.

CONCLUSION

For the foregoing reasons, we ask this Court to reverse the decision below, and to remand the cause with instructions to grant plaintiff's motion for summary judgment.

Respectfully submitted.

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OCTOBER 1963.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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Nos. 18,718, 18,719

In the

United States Court of Appeals

For the Ninth Circuit

W. Willard Wirtz, Secretary of Labor, United States Department of Labor, *Appellant* vs. Western Compress Company, *Appellee*	No. 18,718
W. Willard Wirtz, Secretary of Labor, United States Department of Labor, *Appellant* vs. Federal Compress and Warehouse Company, *Appellee*	No. 18,719

Appellees' Answering Brief

Appeal from the United States District Court
for the District of Arizona

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SUBJECT INDEX

TABLE OF AUTHORITIES CITED

STATUTES Pages

OTHER AUTHORITIES

Nos. 18,718, 18,719

In the

United States Court of Appeals

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W. Willard Wirtz, Secretary of Labor, United States Department of Labor, *Appellant* vs. Western Compress Company, *Appellee*	No. 18,718
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Appellees' Answering Brief

Appeal from the United States District Court
for the District of Arizona

JURISDICTION

Appellees acknowledge the jurisdiction of the District Court below under the Fair Labor Standards Act of 1938 as amended, 29 U.S.C. § 201, et seq., to entertain the injunctive proceedings initiated by the Secretary of Labor under 29 U.S.C. § 217; and Appellees acknowledge the jurisdiction

of this Court of Appeals to review the judgments below under 28 U.S.C. § 1291 and § 1294(1).

APPELLEES' STATEMENT OF THE FACTS

Appellees do not controvert Appellant's statement of facts, as such. Appellees do controvert Appellant's manner of stating the question involved and his manner of stating the facts so as repeatedly to beg the issue.

The question on appeal is: Are *all* employees of Appellees at the facilities in question exempt from the overtime payment requirements of the Fair Labor Standards Act because of the exemption pertaining to "compressing of cotton" in Section 7(c) of the Act?

As is typical of the *petitio principii* approach of Appellant throughout his brief, the Secretary states the issue to be whether the compressing exemption extends to "warehouse storing".

The Secretary's problem is to convince this court, as he could not convince the court below, that storage (or, in the Secretary's term, "*ordinary warehouse* storage", whatever that phrase may mean) is not a *part* of "compressing". A principal tactic of the Secretary appears to be repeatedly to assume in definition the truth of the proposition he is trying to prove. For example, on Page 5 alone of Appellant's brief, the word "warehouse" is used five times, and begging statements are made four times, namely: ". . . by far the greater portion of the premises of each is devoted to warehouse storage of cotton rather than to compressing" ". . .; only one warehouse in each plant is utilized (and only in part) for compressing, while the others are devoted entirely to storing." "Only one compartment in the latter building is used for compressing; the others are solely for storing." ". . . when the compress machinery is in operation the press crews work exclusively in compressing activities."

All of these statements, and many more throughout Appellant's brief, impliedly define "compressing" so as to exclude storage. The approach is worthy of Charles L. Dodgson (Lewis Carroll) in "The Hunting of the Snark":

"Just the place for a snark!
I have said it twice:
That alone should encourage the crew.
Just the place for a snark!
I have said it thrice:
What I tell you three times is true."
Fit the First, Second stanza

SUMMARY OF APPELLEES' ARGUMENT

The order and judgment of the District Court, which in effect found Appellant to be engaged solely in "compressing", as the term is used in Section 7(c), were correct and should be affirmed because:

1. The "compressing" exemption of Section 7(c) is an employer exemption. If the employer is engaged only in compressing at a "place of employment", *all* employees there, whatever their particular duties may be, are exempt from the overtime requirements of the Fair Labor Standards Act.

2. "Compressing", as used in Section 7(c), encompasses the total engagement of Appellant at the locations in question. This is particularly so as to all storage of cotton. This is because:

(a) The proper standard of judicial interpretation must be applied, which is (i) to construe the word in its common sense, without artificial technicality or inherent contradiction, and (ii) to include all "closely and intimately" connected activities.

(b) "Compressing" is a cant term, in the technical sense, which has a definite meaning in the cotton industry. The Secretary of Labor has, in fact, recognized

this. The evidence is uncontradicted that in the cotton industry "compressing" is considered to encompass all storage.

(c) Compressing of necessity requires cotton storage as an integral part of the operation.

(d) The physical facilities of compresses demonstrate that the employer's only engagement is compressing.

(e) The duties of compress employees demonstrate that the employer's only engagement is compressing.

3. There is nothing in legislative history or in administrative interpretation which justifies the Secretary's position.

ARGUMENT

1. The "Compressing" Exemption in Section 7(c) Is an Employer Exemption.

It is important to bear in mind that Section 7(c) is not "an" exemption, but a series of many separate exemptions.[1]

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1. Section 7(c) reads in full:
"(c) In the case of an employer engaged in the first processing of milk, buttermilk, whey, skimmed milk, or cream into dairy products, or in the ginning and compressing of cotton, or in the processing of cottonseed, or in the processing of sugar beets, sugar-beet molasses, sugar cane, or maple sap, into sugar (but not refined sugar) or into sirup, the provisions of subsection (a) shall not apply to his employees in any place of employment where he is so engaged; and in the case of an employer engaged in the first processing of, or in canning or packing, perishable or seasonal fresh fruits or vegetables, or in the first processing, within the area of production (as defined by the Administrator) of any agricultural or horticultural commodity during seasonal operations, or in handling, slaughtering, or dressing poultry or livestock, the provisions of subsection (a), during a period or periods of not more than fourteen workweeks in the aggregate in any calendar year, shall not apply to his employees in any place of employment where he is so engaged."

The exemption in question may be extracted:

> "In the case of an employer engaged in . . . compressing of cotton . . . the provisions of subsection (a) shall not apply to his employees in any place of employment where he is so engaged; . . ."

The threshold question—indeed, the basic question—is whether Appellees, as employers, are engaged *only* in compressing of cotton. Of course, in a real sense, the answer is dependent upon knowledge of the actions of Appellees' employees. An employer necessarily carries out his business purposes through the acts of his employees.

But there is a qualitative difference between an employer exemption and an employee exemption. It is a matter of relationship. In an employee exemption, the critical relationship is the relation of the employee to his work. In employer exemptions, the critical relationship is the relation of the employee's work to his employer's business purpose. For illustration, under Section 13(a)(10)[2], the employee exemption there applies if the individual employee is engaged in "handling" agricultural commodities for market. Whatever the overall business of the employer may be, the particular employee is not exempt unless he, himself, is doing a particular activity, such as "handling". In contrast, under an employer exemption such as in Section 7(c), the particular activity of the employee may be anything at all, so long as it is in furtherance of the employer's "engagement". The employer's exemption is thereby a broader and more flexible exemption, which encompasses any kind of employee physical or mental activity, so long as the activity

---

2. Section 13(a)(10) reads:
"(10) any individual employed within the area of production (as defined by the Secretary), engaged in handling, packing, storing, compressing, pasteurizing, drying, preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market, or in making cheese or butter or other dairy products;"

furthers the employer's engagement in the particular exempted occupation.

Therefore the Secretary's case falls unless he can maintain the proposition that Appellees, as employers, are "engaged" in not one but *two* distinguishable engagements, "compressing" and "ordinary warehouse storage".

2. "Compressing" as Used in Section 7(c) Encompasses the Total Engagement of Appellant at the Locations in Question.

"Compressing" is not defined in the Fair Labor Standards Act. The Secretary of Labor is not given authority to define the term by regulation. This is in contrast to other portions of the Act, such as the "area of production" definition as to which Congress did grant the Secretary such authority. The problem of this case is a problem of definition. It is not to be solved—despite the Secretary's urging—by subordinating the court's prerogative to administrative ukase.

Standards of interpretation. Appellant cites *Shain v. Armour & Co.*, 50 F. Supp. 907 (W.D. Ky. 1943) as rejecting a "strict and technical construction" of the words used in Section 7(c) in favor of a "common sense interpretation". Appellees could not agree more—if the Secretary were as solicitous of "common sense" in construing exemptions. In *Armour* the shoe was on the other foot; the employer there wanted to be strict and technical. In this case, it is the Secretary who scorns "common sense" and who seeks to be strict and technical. Common sense is not an optional standard as suits the Secretary's convenience. Appellees believe the standard to be fairly and correctly stated in *McComb v. Hunt Foods, Inc.*, 167 F.2d 905 (9th Cir. 1948) *cert. denied*, 335 U.S. 845, 93 L.ed. 395, 69 S.Ct. 68 (1948):

> "The Fair Labor Standards Act was fashioned to accomplish certain results—to benefit labor and also to make specific beneficial exemption provisions for a

> certain class of employers described in the Act. Whatever the motive of Congress in so framing this type of 'double-barreled' legislation, the fact remains that its provisions must be read and applied as a whole. The exemption provisions clearly indicate a deliberate purpose on the part of Congress to exclude certain business operations from the sweep of the statute . . .
>
> * * * * * * *
>
> "This is but another way of saying that if the business operations claimed to be exempt are found to fall within the exempt classification, the statute is, as to them, a 'remedial' statute. We agree with the lower court that no formalistic characterization should be permitted in dealing with any of these clauses since the plain intention of the statute should be carried out."

The Secretary's disregard of common sense for expediency is illustrated by the dilemma which the Secretary's position poses. The Secretary, to defeat the Section 7(c) exemption, must maintain that Appellees are engaged in something other than compressing, namely, ordinary warehouse storage. Warehouse storage, *separately* considered, is not per se "in commerce" within the meaning of the Act. *Walling v. Jacksonville Paper Co.,* 317 U.S. 564, 87 L.ed. 460, 63 S.Ct. 332 (1943). In *Hampton v. Marshall, et al.* (D.C. N.D. Texas 1941), 4 Labor Cases, Par. 60,661, involving a farmer's warehousing of cotton "under loan" to the Commodity Credit Corporation, the court said:

> "The Court doesn't believe that the man who grows a product upon the farm is engaged in interstate commerce within the provisions of the Act of Congress, so far as concerns any act yet passed. They may yet pass some that may more definitely define just when the product of the farm may be said to go into interstate commerce. The court doesn't believe that the farmer, because he procures a loan on his cotton, has done

> anything that will place it in interstate commerce any more than if he had left it at his gin or stored it in his own private warehouse upon his premises."

Something more than ordinary warehouse storage is required—in the language of *Jacksonville Paper*—"to establish that practical continuity in transit necessary to keep a movement of goods 'in commerce' within the meaning of the Act." This continuity can exist only if storage is an integral part of a total, unified business of Appellees—the receiving, storing, compacting, rebinding, and shipping movement in which, by natural sequence, a compress launches the cotton into interstate commerce.

Appellees do not urge that their storage of cotton is not in commerce, because "common sense" and honesty compel them to the conclusion that storage is so much an integral part of compressing that it would be captious to say that all storage is not an integrated part of a common movement of the goods into commerce. But if the court is to accept the Secretary's faulty premise that "compressing" and "warehouse storage" are separate engagements, the logical corollary can only be that the "warehouse storage" "comes to rest" before it enters commerce. Because—for the purpose of commerce coverage—the Secretary must argue that storage is closely and intimately related to Appellees' non-storage activities, but must then turn around and argue that storage is not closely and intimately related to non-storage activities in order to defeat Appellees' Section 7(c) exemption, it ill behooves the Secretary to appeal to "common sense".

Common sense dictates, and the Supreme Court has held in *Maneja v. Waialua Agricultural Co.,* 349 U.S. 254, 99 L.ed. 1040, 75 S.Ct. 719 (1955) that the Section 7(c) employee exemptions are *extended* exemptions, not narrowed.

The extension applies to all "closely and intimately connected" activities. The Supreme Court there said, in discussing the exemption for the "processing of sugar cane":

> ". . . this exemption extends to 'employees in any place of employment [where the processing is carried on].' This we feel, covers the workman during the processing season while making emergency repairs in the mill, cleaning the equipment during the week end shutdown, and performing other tasks closely and intimately connected with the processing operation."

The Secretary, however, finds another use for the "close and intimate" connection. Instead of recognizing that this standard enlarges the exemption, the Secretary looks upon it as defeating the compressing exemption entirely. If the Secretary's position were to be accepted, there would be no effective 7(c) exemption in the compressing industry whatever. Because storage cannot be, and is not, set apart from all other compressing activities, and because of the close and intimate interrelationship of employee storage duties with all other operations, the storage which the Secretary would have held to be non-exempt would contaminate the entire plant operations. That this is the Secretary's true aim is evident from the Appellant's brief in which the Secretary makes clear that if Appellees are held to be engaged in any non-exempt work the Secretary will then assert that the unavoidable mixing of exempt and non-exempt work eliminates the exemption entirely upon "the well established rule that the performance of both exempt and non-exempt activities by an employee and the same workweek results in the loss of the exemption." (Appellant's Brief, p. 11, footnote 7, and pp. 14-16.). What the Congress hath given, the Secretary taketh away.

Industry meaning of "compressing". "Compressing" has a definite trade meaning. The term includes storage activi-

ties, just as the word "compress" (the right word in trade use, not "warehouse". Record, p. 99) includes the entire plant facility. This is evident from the deposition of Mr. Dellinger, a man of forty-five years' experience in the cotton business, responding to the government attorney's valiant efforts to get him to say the magic word "warehouse". Record, pp. 98-99:

> "Q. . . . Are you talking about warehouse weight, or warehouse sample, or are you talking about the compress weight which is related to the compress machine itself?
>
> A. Naturally you don't either sample or weigh with a compress machine, but they are all incidental to the shipment and assembly of the cotton. We don't refer to these plants as warehouses; we refer to them as compresses.
>
> Q. Although it is a licensed warehouse under Arizona law?
>
> A. That is correct.
>
> Q. Now, what about the issuance of a negotiable warehouse receipt; is that not a warehouse operation?
>
> A. That is a warehouse operation in connection with the compress, yes. I can't distinguish between—knowing this operation, I can't—in other words, we certainly wouldn't build a warehouse and conduct a warehouse operation in the business we are in without a compress. In other words, they are simply tied together.
>
> Q. Is it not true, then, that you are engaged in two types of businesses: a warehouse and a compress business?
>
> A. Well, we are engaged in the warehouse business to the extent that we have to be. That is about the only answer I can give you. I don't consider we are in the warehouse business. We are in the compress business."

As was said in *Fleming v. Hawkeye Pearl Button Co.*, 113 F.2d 52, 57 (8th Cir. 1940):

> "The interpretation given to the term 'processing' by the trade affected by the exemption is significant. In Carter v. Liquid Carbonic Pacific Corporation, 9 Cir., 97 F.2d 1, 3, the court, in considering the question as to whether a particular product was a 'carbonated beverage' or a 'soft drink' within the meaning of the Revenue Act of 1932, Par. 615(a)(7), 26 U.S.C.A. Int. Rev. Acts, p. 613, said: 'Since we are dealing with a tax which is directed at a particular industry, this definite proof of a trade usage as to the term "carbonated beverages" calls into application the familiar rule that commercial and trade terms having a uniform and definite meaning in commerce and trade will be interpreted accordingly.' "

When it suits his purpose the Secretary adopts the industry meaning of "compressing". In 29 Code of Federal Regulations §§ 780.734 and .735 in discussing the meaning of "compressing", as used in Section 13(a)(10), the Secretary says:

> " 'Compressing' is a term generally applied to the cotton industry only, and the legislative history indicates the intention of Congress to give it such an application here. In practical effect, therefore, the exemption is limited to the compressing of cotton for market.
>
> * * * * * * *
>
> ". . . it does not, however, refer to the process of pressing any commodities other than cotton, such as cottonseed, flaxseed, tung nuts, peanuts, fruits or vegetables, sugar cane or beets, or soybeans, all of which are frequently subjected to a form of pressing operation in extracting oil, juice, or syrup . . ."

In other words when it comes to beets and tung nuts, "compressing" means what the word means to the cotton

industry; but when it comes down to cotton, "compressing" doesn't mean what it means to the cotton industry after all.

Necessity for Storage. Storage is an inescapable concomitant of compress operations. Cotton bales are received from the gin for compressing on a predictable seasonal curve. Record, pp. 18, 19, 36, 38 and 40. The compress cannot compress bales as rapidly as they are received, particularly in the peak season. Record, pp. 78, 79. But cotton is not marketed in the same pattern. Marketing follows the market. Movement into the market depends on the price of cotton and on the orders of shippers. The duration of storage is not in the control of the compress and is not predictable in advance. Record, pp. 15, 88, 89. It is markedly affected by the federal government's own policy under the cotton loan program of the Commodity Credit Corporation, which is intentionally designed to permit the farmer to hold his cotton off the market. Record, pp. 79, 80, 81. This, of course, has the effect of aggravating the need for storage space. Record, p. 81.

There has never been a compress which did not store cotton, nor could there be in an operation such as compressing. The compressing business stands like a floodgate in the stream of cotton to market, impounding the seasonal natural flood of cotton and releasing it gradually into the controlled channels of orderly commerce. In Mr. Dellinger's words, "The compress historically has been the assembly point for the cotton." Record, p. 85.

Congress did not intend, and no court should take the position that an activity which has always been of necessity performed, and which cannot be eliminated, is not a part of an exempt activity. It strains reason to believe one part of an activity which is indistinguishable from another identical part as to location, employees involved,

nature of duties, and, in fact, in all respects, except "on paper", should be exempt, and the identical remainder not. Yet, the Secretary would have this Court so hold. Congress, in the Commodity Credit Program, adopted a policy calculated to avoid the seasonal flood of cotton to market. Certainly Congress could not have intended a Fair Labor Standards Act exemption for compressing which would have the opposite effect by conferring an exemption on only those compressers which would abandon entirely their historic method of doing business, handle only "in transit" cotton, and so open the floodgates of cotton to market.

Physical Facilities. Appellees' compress plants are located in areas in which cotton is grown in large quantities, near the farming and ginning sites. Each plant is on a single enclosed site. At each site are buildings which contain the compressing machinery, storage areas, power plant, repair and maintenance facilities, office space, and, in some cases, residences. Record, pp. 12, 13, 27-29. The compressing machinery is centrally located, the focus of all cotton movement. But for the need for separation and fire walls for fire protection, the ideal facility would be a single large area, with the compressing machinery at its center. Record, p. 74.

Appellant argues (Appellant's Brief, pp. 16-19) that "Employees who perform work in areas not devoted to compressing activities are not within the Section 7(c) exemption for compressing." The circularity of this argument has a bizarre fascination, a "begging" argument of classical purity. The Secretary's initial premise is that "compressing" is carried on only in one building at Federal Compress and in only one compartment at Western Compress. (Appellant's Brief, p. 16) From this it follows that office employees who are not in that building or compartment are

not at a "place of employment" where compressing is carried on. This, in turn, brings the argument full circle to show that it is "incompatible" with the exemption to consider the exemption to apply to employees in the office area. Q.E.D.!

Grant the major premise, and the Secretary's argument is "logical": "Compressing is carried on only in Compartment A. Activity B does not take place in Compartment A; therefore, activity B is not compressing." The snare is to grant the major premise, for to do so concedes the ultimate issue in this case. The conclusion is no more true than the "logically" correct conclusion which is drawn from the propositions: "Scotch whiskey drinkers live only in Scotland. I do not live in Scotland; therefore, I do not drink Scotch."

Appellees have no quarrel in principle with decisions such as *Fleming v. Swift & Co.,* 41 F. Supp. 825 (N.D. Ill. E.D. 1941), which hold that employers who conduct admittedly separate kinds of business at a single location cannot claim that a single "place of employment" concept will turn a non-exempt engagement into an exempt one, such as, for example, in the *Swift* case, as to turn the manufacture of a non-meat product like soap into "slaughtering."

But such cases as *Swift* are not to the point. A judicial or administrative definition of "slaughtering" sheds no light whatever on the meaning of "compressing." The actual physical facilities of the compress plants in this case, without words, speak much more to the point. To borrow a concept from the law of negligence, each structure, and the location, size and function of each structure, meets a "but for" test. But for the economic need to compress cotton there would be no compressing machinery, there would be no storage areas, no power plants, no residences, no office

personnel, no office space, no railroad sidings. The central activity, the activity of compacting the bales of cotton to greater density, is the "proximate cause" of every facility at the appellee's plants. The entire plants are "places of employement" and all activities thereon are "compressing."

Employee Duties. In no other area of fact is the unrealistic and destructive approach of the Secretary better illustrated than in the area of employee duties. In no other case has the Secretary adopted a position which is more extreme. The Secretary proposes a distinction which depends in no way whatever upon any distinguishing characteristic of employee activity.

The artificiality and near-absurdity of the Secretary's position is evident in the Secretary's interpretive Bulletin. 29 C.F.R. Section 780.953 subsection (b) reads:

> "Compressing of Cotton.—The term 'compressing of cotton' includes all the operations which are directly connected with pressing gin bales of cotton into standard density or high density bales, or pressing standard density bales into high density bales, as a part of a single process. Included within the term are the receiving and weighing of bales arriving for compression only or for compression prior to storage; moving the bales to be compressed from receiving areas to the press, or from storage to the press; operating the press or the dinky press, including removing bands, feeding, tying, sewing, and hoisting; and moving the bales from the press to transportation media or to storage after compressing."

Here one finds that "receiving", "weighing" and "moving" bales of cotton are exempt if performed incident to compressing.

Subsection (d), however, reads:

> "Nonexempt operations.—Activities performed in connection with ordinary warehouse storage (as opposed

> to temporary or 'transit' storage, defined in paragraph (c) of this section) are not exempt under this section of the Act. Thus, receiving, weighing, and moving cotton received for ordinary storage, and office, watching, and other work done in connection with ordinary storage, are nonexempt. Also not exempt are activities performed in connection with the storage or handling of bales which pass through the establishment without being compressed, and such activities as handling bagging, ties, or fertilizer sold by the employer."

Now we find that "receiving", "weighing" and "moving" are not exempt if in connection with "ordinary storage."

Thus the same employee, working for the same employer, in the same job, at the same location, and performing the same repetitive activity on identical goods is, according to the Secretary, working from minute to minute, or from bale to bale, either at exempt work incident to compressing or at non-exempt work in connection with ordinary warehouse storage. In simple illustration:

(a) Jones, a trucker, picks up a bale of cotton from the receiving dock and moves it by fork lift to a storage area. He immediately returns over the same route and in exactly the same manner, picks up a second bale, which he moves to the storage area next to the first bale. The first bale is "in transit" cotton; the second is not. In the Secretary's view, Jones was engaged in an operation incident to compressing as to the first bale, but in a storage operation as to the second.

(b) Jones immediately returns and picks up a third and then a fourth bale of "in transit" cotton, which he places in storage next to the first two. Two days later the shipper directs the compress to hold the

> third bale indefinitely, but to ship the fourth bale. The shipper's act, *two days after the fact,* has changed the character of Jones' work from exempt work incident to compressing to non-exempt work incident to ordinary warehousing, not only for that day but for the entire work week.

In similar cavalier fashion, the Secretary dismisses the admitted fact that Appellees' work forces are completely unified and integrated into but a single work force, with a single line of promotion, with a single chain of supervision and administration, without distinction between "storage" personnel and "compressing" personnel, and with regular and from job assignment to job assignment. Record, pp. 22-23, 82-84. These facts do nothing to suggest to the Secretary that possibly the *nature* of the compressing business is unitary. Instead, the Secretary sees in this only untidy management by Appellees who "find it convenient or preferable to at times engage their employees interchangeably in exempt and non-exempt activity." (Appellant's Brief, p. 16). Noticeably, Appellant's Brief offers no suggestions as to how Appellees might conveniently, or at all, do otherwise.

Appellant's catalogue of the purported distinctions between "warehousing" and "compressing" which appears on pages 23 and 24 of Appellant's Brief, warrants close judicial scrutiny. The Court will note that every one of the distinctions made are distinctions "on paper" (licenses, tariffs, warehouse receipts, and income) with the single possible exception of duration of storage. No one of the distinctions exists "in the field." This is true even as to duration of storage; for the storage period is a period of quiescence involving no employee activity. The handling of

the cotton is the same whether the bales remain for six days or for six months. The Secretary's interpretation of the compressing exemption under Section 7(c) is "paper" thin.

3. There Is Nothing in Legislative History or in Administrative Interpretation Which Justifies the Secretary's Position.

A large part of the Secretary's brief is devoted to an effort to raise the Secretary's interpretation of the law to the level of sovereign immunity. He seems to share his view of his role in government with Louis XIV, *"l'ètat, c'est moi."* To this august pinnacle he claims to have been raised by Congress and—by his own bootstraps—by his past administrative interpretations. He is not correct.

Legislative history. The Secretary makes a little mickle of legislative history do many a muckle. The Secretary relies greatly on the argument that because the phrase "compressing and storing" in early drafts of the Act was changed by floor amendment, without explanation in debate, that this demonstrates that, in connection with compressing, "storing was the subject of explicit Congressional attention, and that storing was deliberately excluded from its scope." (Appellant's Brief, pp. 19-20). It is true that the original phrase "compressing and storing" was reduced to "compressing". It is also true that the phrase "ginning and baling" was reduced to "ginning". The House Labor Committee changed the initial wording "ginning and baling of cotton" to "ginning, compressing and storing of cotton." The only comment on the change in the report is that "A committee amendment proposes as an additional exemption persons employed in connection with the ginning, compressing, and storing of cotton, or with

the processing of cottonseed." (H.R. Rep. 1452, Senate Bill 2475, Aug. 6, 1937, 75th Congress, 1st. Sess. p. 14). If this shows anything at all, the use of the words "in connection with" indicates an intent for a broad construction of terms.

Supposing the reduction of the phrase "compressing and storing" to "compressing" to show, as the Secretary says, an explicit congressional intent to remove storage from the scope of "compressing", by exactly the same reasoning—if it be reasoning—the reduction of the phrase "ginning and baling" to "ginning" showed an explicit congressional intent to exclude baling from the scope of "ginning". Baling, of course, is an intimate and integral part of the ginning process. To hold baling to be non-exempt work as to ginning would have the same practical effect of writing the exemption entirely out of the law as would be the effect of exclusion of storage from the meaning of compressing. The Secretary has apparently overlooked this golden opportunity to destroy the exemption for the ginning industry; for in his Wage & Hour Release No. M-9, dated February 14, 1947, he recognizes that "ginning" means the removal of cottonseed from lint and the subsequent pressing and wrapping of the bale of lint.

The Secretary is not utterly without resourcefulness in this arena, however. He has taken to the Supreme Court the proposition that the phrase "ginning *and* compressing of cotton" in Sec. 7(c) shows a congressional intent to exempt only those businesses which both gin *and* compress, an exercise of ingenunity which was rejected by the courts in *Peacock v. Lubbock Compress Company,* 252 F.2d 892 (5th Cir., 1958), *cert. denied* 356 U.S. 973, 2 L.ed.2d 1147, 78 S.Ct. 1136 (1958). Thus the Secretary, that embodiment of "experience and informed judgment", has seriously maintained that compressing must *include* ginning but *exclude*

storage in order to be exempt, in the face of the reality that compresses *never* gin and *always* store.

In the *Peacock* case, the Fifth Circuit said:

> "The statute, of course, says 'ginning *and* compressing of cotton.' If it is conjunctive, the watchmen are right, the Compress is wrong, and the cause must be reversed. This is so because it is admitted that the Compress Company is engaged exclusively in compressing cotton and never has engaged in the activity of ginning cotton or a combination of ginning and compressing. Actually, it cuts much deeper since it is an acknowledged undisputed fact of the cotton industry that compressing is an operation entirely removed from ginning and that the two are never carried on together. To read it literally here is to read it out of the statute.
>
> * * * * * * *
>
> "For us to conclude that Congress meant 'and' in a literal conjunctive sense is to determine that Congress meant in fact to grant no relief. To do this is to ignore realities, for Congress has long been acutely aware of the manifold problems of the production, marketing and distribution of cotton. The commodity is one of the most important in the complex pattern of farm parity and production control legislation. It is inconceivable that Congress legislated in ignorance of the distinctive nature of the physical operations of ginning of cotton as compared to the compressing of cotton, or that, with full consciousness of these practicable considerations, it meant to lay down a standard which could not be met in fact."

Appellees do not presume, as does the Secretary, to divine congressional intent from such meager legislative history. Appellees do suggest that there are two other more reasonable explanations than the explanation of the Secretary's to account for the omission by Congress of "storage" from Section 7(c). One reason, the most probable, is that

like "baling" in relation to "ginning", the word is tautologous. A second reason is that Congress did not wish to grant the 7(c) exemption to warehouses, which do nothing but store cotton. There are many more such warehouses than there are compresses. Congress could exempt and did exempt cotton storage warehouses under Section 13(a)(10). To exempt such warehouses under Sec. 7(c) would have created a nation-wide exception. The scope of Section 13(a)(10) is limited to "areas of production." A natural and rational interpretation of congressional intent is simply that Congress intended to exempt certain agricultural warehouses, cotton among others, in "areas of production", but not to exempt similar warehouses outside of such areas. The "unfair competition" argument advanced by the Secretary is meretricious. It is not unreasonable to assume that Congress could not have intended to exempt storage at compresses because Congress would then have given compresses a competitive advantage. It is absolutely clear that by enacting Section 13(a)(10) Congress intended to create exactly such a competitive advantage in favor of occupations within "areas of production" over their competitors not so fortunately located.

Administrative interpretation. The Secretary's position that his past administraive interpretations have resolved the problem of defining compressing calls to mind the comic placard, "Are You Helping to Solve the Problem, or Are you Part of It?"

Appellant's Brief cites Section 16 of the administrative Interpretative Bulletin No. 14, issued August 21, 1938. This section reads:

> *"Ginning and Compressing of Cotton.*
>
> This term includes the operations of separating the cotton lint from the seed, pressing and wrapping such

lint into bales, and then compressing such bales. The receiving and weighing of the lint, both before and after compressing, would also seem to be part of the compressing operation. Such operations, therefore, are included within the exemption.

The storing of cotton, either before or after compressing, is not, in our opinion, included in the term 'ginning and compressing of cotton.' Support for this position is found in the fact that the word 'storing' was in the bill at one time in connection with an exemption from the hour provisions and was subsequently deleted. (See also par. 23)."

If one follows the Bulletin's instructions to "See par. 23" (which Appellant's Brief does *not* cite), one finds par. 23 (a) to read:

"Which Employees Are Exempt.

The determination as to whether all employees of the employer who are working in the establishment are included in the exemption or whether the exemption applies to only such employees as perform the operations described in the section must be made in the light of the legislative history of section 7(c). The congressional debates show that the purpose of this section was to relieve processors of seasonal agricultural commodities from the hour provisions of the act so as to enable them more easily to conduct their operations during the peak seasons. *It is our opinion, therefore, that only the employees who perform the operations described in section 7 (c) or who perform operations that are so closely associated thereto that they cannot be segregated for practical purposes, and whose work is also controlled by the irregular movement of commodities into the establishment, are covered by the exemption.* For example, in the ordinary case, none of the employees in a department separate from the department in which the exempt operations are performed will be exempt. Thus, employees work-

> ing in the meat-curing or sausage-making departments of a meat packing house will not be within the exemption." (Emphasis supplied.)

The compresses' continuous position has been that the Secretary's interpretations in Pars. 16 and 23(a) are squarely contradictory. Storage of cotton at compresses meets every standard for exemption under Par. 23(a), as an operation which is "closely associated", which "cannot be segregated for practical purposes" and which is "controlled by the irregular movement of commodities into the establishment." This fundamental functional standard controls over the Secretary's Par. 16 *ipse dixit.*

It was not until 1961, after the filing of this action, that the Secretary attempted to resolve his own self-contradiction by promulgating Part 780, Title 29—Labor, Chap. V—Wage & Hour Division, Department of Labor, Section 780.953, Code of Federal Regulations. Even then he "split the difference." *Some* storage operations ("incident to compressing") are conceded to be exempt—the Par. 23(a) test of Bulletin No. 14. But *some* storage is said not to be exempt (the "ordinary warehouse" kind)—using the fiat approach of Par. 16. In short the only consistent administrative position has been to be contradictory, arbitrary, ambiguous and impractical.

In any case, the Secretary has paid no more than lip service to whatever he conceives his true position to have been. The instant case is a case of no more than second impression in the more than 20 years since enactment of the Fair Labor Standards Act, even though the compresses' position in opposition to the Secretary has been constant and clear. The only prior case on point supports the compresses. In *Byus v. Traders Compress Co.,* 59 F. Supp. 18 (D.C. W.D. Okla., 1942). There the court found and held:

"During each week of the period involved in each of these cases the defendant was engaged at its compress plant located near Oklahoma City in Oklahoma County, Oklahoma, in the compression of cotton and incidental to its compression operations it was engaged in storing and physically handling cotton in bales and shipping cotton for the account of its customers. Each of the plaintiffs was employed by and worked for the defendant in the business of compressing cotton as presser, truck driver and handyman.

* * * * * * *

Conclusions of Law

1. The defendant was engaged in the business of compressing cotton within the meaning of sec. 207(c), 29 U.S.C.A., and each of the plaintiffs was employed in such place of business of the defendant and the provisions of subdiv. (a) sec. 207, 29 U.S.C.A. did not apply to the plaintiffs as employees in defendant's place of business."

As his trump card the Secretary claims that his interpretation of the compressing exemption is now above attack because in 1949 Congress in amending the Fair Labor Standards Act—on points which had nothing whatever to do with the compressing exemption—included, as Section 16(c), a "saving" provision to the effect that prior administrative orders, regulations and interpretations should remain in effect, except to the extent inconsistent with the amendments. Act Oct. 26, 1949, 63 Stat. 920, 29 U.S.C. 208 note. This, the Secretary contends, elevated beyond controversion all then existing administrative interpretations, by imposing thereon the "unique imprimatur" of Congress.

The Secretary disregards these points: First, as discussed, the pre-1949 administrative interpretation of "compressing" was unclear and contradictory, and in any event

was not the 1961 interpretation. Second, Congress in the Fair Labor Standards Act has *not* given the Secretary comprehensive rule-making powers. Congress has withheld such authority except in specific instances, no one of which here applies. When Congress wants the Secretary's interpretations to have the force of law Congress says so directly and unmistakably. Third, in 1949 Congress must be assumed to have been as well aware of the 1944 Supreme Court decision of *Skidmore v. Swift & Co.,* 323 U.S. 134, 89 L.ed 124, 65 S.Ct. 161, as it was of prior administrative interpretations. By not having reversed *Skidmore* in the 1949 legislation, Congress presumably intended the case to stand as correctly stating the extent and measure of the weight of the Secretary's interpretations. The *Skidmore* standard appears below in the quotation from *Mitchell v. Trade Winds Company,* 289 F.2d 278 (5th Cir. 1961).

"Unique Imprimatur" sounds sweetly to the ear of the Secretary, and he frequently repeats it. Indeed, the phrase *is* lambent with an aura of pontifical infallibility. But in *Trade Winds* the court of the Fifth Circuit stoutly withstood conversion to Secretaryism:

> "As we have indicated, the Secretary's position is supported by his early interpretation of the Act to the extent that he expressed the view that only those activities should be considered as processing that were affected by the natural forces that caused Congress to create the exemption in the first instance. He urges that not only is this interpretation entitled to 'great weight,' Steinmetz v. Mitchell, 5 Cir., 268 F.2d 501, but it should be considered as having received the 'unique imprimatur' of Congress, Libby, McNeil & Libby v. Mitchell, 5 Cir., 256 F.2d 832, 837. This because, in adopting the 1949 amendment to the law, Congress expressly provided that existing interpretations of the Administrator or of the Secretary of Labor 'shall remain in effect.'

"We think the recognized basic authority as to the recognition to be accorded ex parte administrative rulings by the Secretary of Labor in administering the Wage and Hour law is that stated by the Supreme Court in Skidmore v. Swift & Co., 323 U.S. 134, 140, 65 S.Ct. 161, 164, 89 L.Ed. 124:

> "'We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.'

"We consider that this formula is the one by which we are to weigh the administrative interpretation in this case. Although the appellant's brief asserts that the amendatory Act of 1949 'expressly declared * * * that existing administrative interpretations not inconsistent with the amendments shall remain in effect,' he fails to include in the text of his argument the rest of the section which is 'as an order, regulation, interpretation * * *' It is plain, therefore, that all this provision was intended to accomplish was to negative the idea that following the amendment it would be necessary for the Secretary to promulgate new orders, regulations and interpretations as to matters not changed in the Act. It was not intended to, and, of course, it did not, incorporate the prior existing orders, regulations and interpretations as part of the statutory enactment."

Far from being satisfied with the "imprimatur" of the Secretary, Congress has expressed sheer exasperation. In

the Fair Labor Standards Amendments of 1961[3] Congress directed the Secretary to study "the complicated system of

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3. Sec. 13 Fair Labor Standards Amendments of 1961, Pub. L. 87-30, Act of May 5, 1961, 87th Congress, which reads:

"Sec. 13. The Secretary of Labor shall study the complicated system of exemptions now available for the handling and processing of agricultural products under such Act and particularly sections 7(b)(3), 7(c), and 13(a)(10), and the complex problems involving rates of pay of employees in hotels, motels, restaurants, and other food service enterprises who are exempted from the provisions of this Act and shall submit to the second session of the Eighty-seventh Congress at the time of his report under section 4(d) of such Act a special report containing the results of such study and information, data and recommendations for further legislation designed to simplify and remove the inequities in the application of such exemptions."

The Secretary has not as yet been up to the full task set him by Congress. He submitted to Congress "data pertinent to an evaluation of exemptions available under the Fair Labor Standards Act" Feb. 21, 1962 (U.S. Gvt. Printing Office: 1962 0-630503); but so far no recommendations for legislation. The Secretary's letter of transmittal of the data to Congress reads:

"February 21, 1962

"The Honorable Lyndon B. Johnson
President of the Senate
Washington 25, D.C.

Dear Mr. President:

Transmitted herewith is the final report on the exemptions available for the handling and processing of agricultural products, prepared by the Wage and Hour Division in accordance with section 13 of the Fair Labor Standards Amendments of 1961. A preliminary report was transmitted on January 31, 1962.

The final report includes, in addition to the information contained in the preliminary report, an inter-industry analysis. With respect to the exemptions from the maximum hours provisions, further analyses of the data are now being made. These analyses will concern the effects of providing various exemption periods and the effects of various hours limitations on the exemption, as well as the effects of providing no overtime exemption for each of the industries engaged in the handling and processing of farm products. When the work has been completed, legislative recommendations will be developed and submitted to the Congress."

exemptions" for the handling of agricultural products, particularly as to Sections 7(b)(3), 7(c) and 13(a)(10), and to make recommendations for further *legislation* "designed to simplify and remove the inequities in the application of such exemptions." This strong language is not the genial permission of an indulgent Congress for the Secretary to continue on his merry untrammeled way. Instead, it is a command to him to cease administrative tinkering and to return the problem to the Congress for orderly and comprehensive reappraisal. The Secretary's steps should lead him to Congress, not to this court.

CONCLUSION

For the reasons here set forth, Appellees pray that this court affirm the judgment appealed from.

Respectfully submitted,

Snell & Wilmer
and
Nicholson & Moore

By Frederick K. Steiner, Jr.

Attorneys for Appellees

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Frederick K. Steiner, Jr.

No. 18,723

In the United States Court of Appeals for the Ninth Circuit

JOHN D. and JANICE L. EDWARDS, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

On Petition From the Decision of the Tax Court of the United States

BRIEF FOR THE RESPONDENT

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INDEX

CITATIONS

Miscellaneous: Page

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BRIEF FOR THE RESPONDENT

OPINION BELOW

The findings of fact and the opinion of the Tax Court (Doc. No. 14)[1] are reported at 39 T.C. No. 8.

JURISDICTION

This appeal involves a deficiency in federal income for the year 1955. After being served with a notice of deficiency, taxpayers seasonably filed a petition

[1] Doc. No. references are to the documents as enumerated in the index to the record on review, as Certified to this Court by the Clerk of the Tax Court of the United States.

with the Tax Court seeking to resist the assessment of additional income taxes for the year 1955. (Doc. No. 2.) The decision of the Tax Court, adverse to the taxpayers, was entered on December 10, 1962 (Doc. No. 1) and the case was brought to this Court by their petition for review filed on April 4, 1963 (Doc. No. 17). Jurisdiction is conferred on this Court by Section 7482 of the Internal Revenue Code of 1954.

QUESTIONS PRESENTED

1. Whether the Tax Court correctly decided that a tax which should have been, but in fact was not, withheld from payments made to an employee may *not* be credited by that employee against his reportable tax for the subject year.

2. Whether the Tax Court correctly decided that for purposes of determining a taxpayer's sick pay exclusion only those days for which he is actually paid pursuant to a wage continuation plan, and not the entire period over which he is absent, are to be considered in computing the exclusion allowable under Section 105 of the 1954 Internal Revenue Code.[2]

STATUTES AND REGULATIONS INVOLVED

The statutes and Regulations involved are set out in the Appendix, *infra*.

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[2] All section references herein are to the 1954 Internal Revenue Code.

STATEMENT

In 1955 the taxpayer[3] received $13,027.21 from his employer in settlement of two judgments totalling $15,155. These judgments resulted from lawsuits brought to collect bonuses allegedly owed him. (Doc. No. 14, pp. 3-5.) In computing the settlement no amounts were excluded for withholding taxes and there is no evidence in the record to indicate that his employer or the taxpayer ever specifically contemplated the retention of any amounts for the purpose of this tax. (Doc. No. 14, pp. 6, 9.) Taxpayer's employer did not, in fact, withhold any amount for withholding taxes nor did it pay any amount to the Internal Revenue Service on account of those taxes. Taxpayer received no W-2 Form from his employer for the year 1955, nor did he receive any other notice indicating that the company had withheld any amount for taxes from the settlement. (Doc. No. 14, p. 6.)

The taxpayer filed a return for the year 1955 reporting as income the full amount of the settlement, less attorney's fees and costs. He later amended his return so as to report as income the full amount of the judgments, and took as a tax credit an amount ($2,604.30) "which he stated was his computation of the tax 'which should have been paid' by the company." (Doc. No. 14, p. 6.)

The Commissioner refused to accept the amount claimed as a credit on the amended return, asserted

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[3] References to "taxpayer" are to Petitioner John Edwards.

a deficiency, and prevailed in the Tax Court action in which that deficiency was contested.

In 1955 the taxpayer was hospitalized in connection with his work from November 30 through December 23. He was unable to work for a period of five weeks. Prior to and following his absence from employment he had worked a six-day week. (Doc. No. 14, p. 6.) Pursuant to a wage continuation plan he was paid $134 for three days of his hospitalization, one day for each of the two months he had previously worked and for the first day of the injury. On his tax return for 1955, taxpayer claimed an exclusion of $96, which was partially disallowed. (Doc. No. 14, pp. 7-8.) The taxpayer brought this issue before the Tax Court, which held that he was entitled to exclude $50 of the $134, i.e., one-half of the $100 maximum weekly exclusion allowable under Section 105(d) of the 1954 Internal Revenue Code. (Doc. No. 14, p. 12.)

Taxpayer appears to have subsequently obtained a judgment for pay for the full amount of time he was absent from work, and now urges that he is entitled to the maximum exclusion of $100 per week for the period November 30 to December 31, 1955. (Br. 3.) (There is nothing in the record or taxpayer's brief to indicate the dollar amount of the judgment awarded him, but presumably it exceeded $500.) A portion of the judgment is quoted in taxpayer's brief (Br. 2-3) and recites that payments for the period not worked were owing the taxpayer as a result of the "custom and practice" of the industry.

SUMMARY OF ARGUMENT

I. Section 31(a)(1) of the 1954 Internal Revenue Code and the Treasury Regulations promulgated thereunder, provide that a tax credit is to be given a taxpayer for that tax *actually* withheld from his wages by his employer. Where no tax has been withheld, the taxpayer can claim no credit. Although the Government may seek to collect the tax from an employer who should have, but failed to, withhold it this remedy is not exclusive and surely does not preclude collection of the tax from the income-recipient.

II. When an employee is awarded sick pay under a wage continuation plan, the amount paid him cannot be allocated over the entire period for which he was absent for purposes of computing the allowable weekly exclusion available to him under Section 105(d) of the 1954 Internal Revenue Code. The sick pay is to be imputed only to the days for which the taxpayer was actually reimbursed. In this case the taxpayer was paid for three days, his work week was six days, and therefore, he is entitled to one-half of the maximum weekly exclusion ($100) allowable under Section 105(d) of the 1954 Internal Revenue Code.

ARGUMENT

I

The Tax Court Was Correct In Deciding That the Taxpayer Should Not Be Allowed a Credit for Withholding Tax for the Year 1955, There Being No Evidence That Such Tax Was In Fact Withheld By His Employer

Taxpayer had been employed by Arthur Fralick during 1953 as a steel construction superintendent

on a construction project. He earned but was not paid a contingent bonus of $1,000. In 1954 he was promised a contingent bonus in connection with another project of Fralick's but was fired before he could collect it. Edwards brought a successful suit to recover those bonuses and was awarded judgments in the total amount of $15,155. (Doc. No. 14, p. 3.) Fralick considered appealing the lower court decision, but because of the necessity to clear up outstanding litigation he agreed to settle the judgments for $13,027.21, less attorney's fees, costs, and a judgment owed Fralick by the taxpayer. (Doc. No. 14, p. 4.) The taxpayer received the agreed-upon amount in full satisfaction of the judgments. At no time did the parties negotiate or include in their settlement agreement any figure reflecting the withholding taxes or the liability therefor. (Doc. No. 14, p. 4.) The Tax Court found, as a fact, that "The company did not withhold any amount on account of Federal income taxes from the sum paid in settlement of the litigation." (Doc. No. 14, p. 6.) Taxpayer in his brief (Br. 9) acknowledges that he was informed by the Internal Revenue Service that no withholding tax was paid by his employer.

Whether Fralick should have withheld an amount for tax purposes is immaterial to this controversy.[4] The important and controlling fact is that no tax

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[4] The Internal Revenue Service has ruled that lump-sum payments to an employee made because of the cancellation of an employment contract are not subject to withholding. Rev. Rul. 55-520, 1955-2 Cum. Bull. 393; Rev. Rul. 58-301, 1958-1 Cum. Bull. 23; see also, Rev. Rul. 59-227, 1959-2 Cum. Bull. 13.

was withheld by Fralick. Section 31(a)(1) (Appendix, *infra*) provides that a credit shall be given to a taxpayer for "The amount *withheld* under Section 3402 as tax on the wages of any individual," thus restricting the tax credit to amounts actually retained by the employer.[5] Where there clearly has been no withholding, as in this case, no credit can be claimed for it.

The principal purpose of the withholding tax system is to simplify the administrative problems of tax collection.[6] The plan was hardly designed to relieve

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[5] See Treasury Regulations on Income Tax (1954 Code), Sec. 1.31-1(a) Appendix, *infra*). "If the tax has *actually* been withheld at the source, credit or refund shall be made to the recipient of the income even though such tax has not been paid over to the Government by the employer." (Emphasis supplied.) Cf., *Basila* v. *Commissioner*, 36 T.C. 111, in which an employee sought to take a withholding credit for the year 1952, although his employer did not actually pay over the withholding tax until 1953. The Tax Court allowed the 1952 credit, on the finding that the tax was actually withheld in that year.

As carefully noted by the court below (Doc. No. 14, p. 9) in distinguishing this case from *Basila*, "The evidence in this case clearly shows, however, that the employer did not comply with the withholding provisions but paid to petitioner the entire amount agreed to by the parties in full satisfaction of the judgment."

[6] See H. Rep. No. 2333, 77th Cong., 2d Sess., p. 14 (1942-2 Cum. Bull. 372, 385), on the Revenue Act of 1942, c. 619, 56 Stat. 798. ("Under this system many recipients of income who would not otherwise pay income tax either by reason of neglect to file returns or not being employed in the year following the year when income is derived, or for other reasons, will be brought under the income tax.")

It was also thought that the withholding system would ease the burden on taxpayers by "enabling him to meet his tax payments with a minimum of strain." *Ibid.*

taxpayers of their liability for the tax on their own income. Where the agent for tax collection (i.e., the employer) has been remiss in his responsibility, the taxpayer cannot be heard to disclaim his own liability. To hold otherwise would produce administrative headache, inequity, and, possibly, collusion between financially-precarious employers and their employees.

II

The Tax Court Was Correct In Finding That the Taxpayer Could Exclude As Sick Pay One-Half of the Maximum Weekly Exclusion Provided Under Section 105(d) Since the Taxpayer Was Paid for But Three Days of Absence and Normally Worked a Six-Day Week

The taxpayer was injured and hospitalized on November 30, 1955. He was released from the hospital on December 23, 1955, and was, in all, absent from work for a period of five weeks. (Doc. No. 14, p. 6.) He was paid, pursuant to a wage continuation plan of his employer, $134 for three days of absence, attributable to the day of the injury and the two days thereafter. (Doc. No. 14, p. 7.) The taxpayer claimed that the amount paid him should be spread over the entire term of his absence and should not be allocated only to the three days for which he was, in fact, paid. The Tax Court rejected this contention, properly limiting its exclusion to $50 which represented one-half of the maximum weekly exclusion ($100) allowable under Section 105(d) (Appendix, *infra*).

That section clearly dictates that sick pay must be included as gross income to the extent that the

payments exceed a *weekly rate* of $100. In computing the weekly rate of pay, and the allowable exclusion therefrom, the Regulations (Appendix, *infra*) specifically provide for cases like this one where an employee receives payments under a wage continuation plan for "less than a full pay period":

> Sec. 1.105-4. *Wage continuation plans.*
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> * * * *
>
> (d) *Exclusion not applicable to the extent that amounts exceed a weekly rate of $100—In general.* Amounts received under a wage continuation plan which are not excludable from gross income as being attributable to contributions of the employee (see § 1.105-1) must be included in gross income under section 105(d) to the extent that the weekly rate of such amounts exceeds $100. Thus, an employee, who receives $50 under his employer's wage continuation plan on account of his being absent from work for two days due to a personal injury, cannot exclude the entire $50 under section 105 (d) if the weekly rate of such benefits exceeds $100. If an employee receives payments under a wage continuation plan for less than a full pay period, the excludability of such payments shall be determined under subparagraph (2) of this paragraph. * * *
>
> * * * *
>
> (2) *Daily exclusion.* If an employee receives payments under a wage continuation plan for less than a full pay period, the extent to which such benefits are excludable under section 105 (d) shall be determined by computing the daily

> rate of the benefits which can be excluded under section 105(d). Such daily rate is determined by dividing the weekly rate at which wage continuation payments are excludable ($100) by the number of work days in a normal work week.
> * * *
>
> * * * *
>
> (26 C.F.R., Sec. 1.105-4.)

Under the aforesaid formula, the excludable daily rate of sick pay was $16.67 ($100 divided by 6), and since taxpayer was paid for three days his allowable exclusion was $50, as the Tax Court so found. "Stated another way, petitioner was paid for one-half of his normal working week. He would, therefore, be allowed to exclude one-half of the $100 weekly rate limitation or $50." (Doc. No. 14, p. 12.)

There is nothing in the Code or the Regulations which suggests that sick pay may be spread over a period different from that for which it was actually paid. If an employee were paid $500 for the first week of an absence and nothing thereafter, and he was absent from work for a month, only $100 would be excludable. The terms of the wage continuation plan are controlling and if that plan "accelerates" income, the exclusion privilege extended under Section 105(d) cannot be stretched or reinterpreted to permit the spreading of that income, as taxpayer urged the lower court to hold.

The taxpayer now claims that a Washington State Court judgment has awarded him an amount of sick pay, apparently in excess of $500, for the period of absence. However, that amount is includible in *pres-*

ent income, subject to a possible credit under the provisions of Section 1303.[7] Furthermore, it is doubtful whether taxpayer would be entitled to an exclusion under Section 105(d) since payments, to qualify, must be made pursuant to a wage continuation plan.[8]

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[7] SEC. 1303. INCOME FROM BACK PAY.

(a) *Limitation on Tax.*—If the amount of the back pay received or accrued by an individual during the taxable year exceeds 15 per cent of the gross income of the individual for such year, the part of the tax attributable to the inclusion of such back pay in gross income for the taxable year shall not be greater than the aggregate of the increases in the taxes which would have resulted from the inclusion of the respective portions of such back pay in gross income for the taxable years to which such portions are respectively attributable, as determined under regulations prescribed by the secretary or his delegate.

* * * *

(26 U.S.C. 1958 ed., Sec. 1303.)

[8] Treasury Regulations on Income Tax (1954 Code):

Sec. 1.105-4 *Wage continuation plans.*

(a) *In general.*—* * *

(2) (i) Section 105(d) is applicable only if the wages or payments in lieu of wages are paid pursuant to a wage continuation plan. The term "wage continuation plan" means an accident or health plan, as defined in § 1.105-5, * * *.

* * * *

(26 C.F.R., Sec. 1.105-4.)

Sec. 1.105-5 *Accident and health plans.*

* * * An accident or health plan may be either insured or noninsured, and it is not necessary that the plan be in writing or that the employee's rights to benefits under the plan be enforceable. However, if the employee's rights are not enforceable, an amount will

However, that issue is not properly before this Court, which has only to decide whether, as we urge, the Tax Court correctly permitted the exclusion of $50 of the $134 which the taxpayer actually received in 1955 as sick pay for three days of absence.

CONCLUSION

For the reasons herein stated, the judgment of the Tax Court below should be affirmed.

Respectfully submitted,

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AUGUST, 1963.

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be deemed to be received under a plan only if, on the date the employee became sick or injured, the employee was covered by a plan (or a program, policy, or custom having the effect of a plan) providing for the payment of amounts to the employee in the event of personal injuries or sickness, and notice or knowledge of such plan was reasonably available to the employee. * * *

(26 C.F.R., Sec. 1.105-5.)

Certificate

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Dated: ..... day of ....., 1963.

Robert J. Golten

APPENDIX

Internal Revenue Code of 1954:

SEC. 31. TAX WITHHELD ON WAGES.

(a) *Wage Withholding for Income Tax Purposes.*—

(1) *In general.*—The amount withheld under section 3402 as tax on the wages of any individuall shall be allowed to the recipient of the income as a credit against the tax imposed by this subtitle.

* * * *

(26 U. S. C. 1958 ed., Sec. 31.)

SEC. 105. AMOUNTS RECEIVED UNDER ACCIDENT AND HEALTH PLANS.

* * * *

(d) *Wage Continuation Plans.*—Gross income does not include amounts referred to in subsection (a) if such amounts constitute wages or payments in lieu of wages for a period during which the employee is absent from work to account of personal injuries or sickness; but this subsection shall not apply to the extent that such amounts exceed a weekly rate of $100. In the case of a period during which the employee is absent from work on account of sickness, the preceding sentence shall not apply to amounts attributable to the first 7 calendar days in such period unless the employee is hospitalized on account of sickness for at least one day during such period. If such amounts are not paid on the basis of a weekly pay period, the Secretary or his delegate shall by regulations prescribe the

method of determining the weekly rate at which such amounts are paid.

* * * *

(26 U.S.C. 1958 ed., Sec. 105.)

SEC. 3402. [As amended by Sec. 2(a) of the Act of August 9, 1955, c. 666, 69 Stat. 605] INCOME TAX COLLECTED AT SOURCE.

(a) *Requirement of Withholding.*—Every employer making payment of wages shall deduct and withhold upon such wages (except as provided in subsection (j)) a tax equal to 18 percent of the amount by which the wages exceed the number of withholding exemptions claimed, multiplied by the amount of one such exemption as shown in subsection (b) (1).

* * * *

(d) *Tax Paid by Recipient.*—If the employer, in violation of the provisions of this chapter, fails to deduct and withhold the tax under this chapter, and thereafter the tax against which such tax may be credited is paid, the tax so required to be deducted and withheld shall not be collected from the employer; but this subsection shall in no case relieve the employer from liability for any penalties or additions to the tax otherwise applicable in respect of such failure to deduct and withhold.

* * * *

(26 U. S. C. 1958 ed., Sec. 3402.)

SEC. 3403. LIABILITY FOR TAX.

The employer shall be liable for the payment of the tax required to be deducted and withheld under this chapter, and shall not be liable to any person for the amount of any such payment.

(26 U. S. C. 1958 ed., Sec., 3403.)

Treasury Regulations on Income Tax (1954 Code):

Sec. 1.31-1 *Credit for tax withheld on wages.*

(a) The tax deducted and withheld at the source upon wages under chapter 24 of the Internal Revenue Code of 1954 (or in the case of amounts withheld in 1954, under subchapter D, chapter 9 of the Internal Revenue Code of 1939) is allowable as a credit against the tax imposed by subtitle A of the Internal Revenue Code of 1954, upon the recipient of the income. If the tax has actually been withheld at the source, credit or refund shall be made to the recipient of the income even though such tax has not been paid over to the Government by the employer. For the purpose of the credit, the recipient of the income is the person subject to tax imposed under subtitle A upon the wages from which the tax was withheld. For instance, if a husband and wife domiciled in a State recognized as a community property State for Federal tax purposes make separate returns, each reporting for income tax purposes one-half of the wages received by the husband, each spouse is entitled to one-half of the credit allowable for the tax withheld at source with respect to such wages.

* * * *

(26 C.F.R., Sec. 1.31-1.)

Sec. 1.105-4. *Wage continuation plans.*

* * * *

(d) *Exclusion not applicable to the extent that amounts exceed a weekly rate of $100*—(1) *In general.*—Amounts received under a wage continuation plan which are not excludi-

ble from gross income as being attributable to contributions of the employee (see § 1.105-1) must be included in gross income under section 105(d) to the extent that the weekly rate of such amounts exceeds $100. Thus, an employee, who receives $50 under his employer's wage continuation plan on account of his being absent from work two days due to a personal injury, cannot exclude the entire $50 under section 105 (d) if the weekly rate of such benefits exceeds $100. If an employee receives payments under a wage continuation plan for less than a full pay period, the excludibility of such payments shall be determined under subparagraph (2) of this paragraph. * * *

* * * *

(2) *Daily exclusion.* If an employee receives payments under a wage continuation plan for less than a full pay period, the extent to which such benefits are excludable under section 105 (d) shall be determined by computing the daily rate of the benefits which can be excluded under section 105(d). Such daily rate is determined by dividing the weekly rate at which wage continuation payments are excludable ($100) by the number of work days in a normal work week. * * *

* * * *

(26 C.F.R., Sec. 1.105-4.)

Treasury Regulations on Employment Tax (1954 Code):

Sec. 31.3402(d)-1 *Failure to withhold.*

If the employer in violation of the provisions of section 3402 fails to deduct and withhold the

tax, and thereafter the income tax against which the tax under section 3402 may be credited is paid, the tax under section 3402 shall not be collected from the employer. Such payment does not, however, operate to relieve the employer from liability for penalties or additions to the tax applicable in respect of such failure to deduct and withhold. The employer will not be relieved of his liability for payment of the tax required to be withheld unless he can show that the tax against which the tax under section 3402 may be credited has been paid. See § 31.3403-1, relating to liability for tax.

(26 C.F.R., Sec. 31.3402(d)-1.)

Sec. 31.3403-1 *Liability for tax.*

Every employer required to deduct and withhold the tax under section 3402 from the wages of an employee is liable for the payment of such tax whether or not it is collected from the employee by the employer. If, for example, the employer deducts less than the correct amount of tax, or if he fails to deduct any part of the tax, he is nevertheless liable for the correct amount of the tax. See, however, § 31.3402(d)-1. The employer is relieved of liability to any other person for the amount of any such tax withheld and paid to the district director or deposited with a duly designated depositary of the United States.

(26 C.F.R., Sec. 31.3403-1.)

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No. 18,724

IN THE

United States Court of Appeals

For the Ninth Circuit

F. J. GUNTHER,

Appellant,

vs.

SAN DIEGO & ARIZONA EASTERN RAILWAY COMPANY, a corporation,

Appellee.

BRIEF FOR APPELLANT

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Subject Index

Table of Authorities Cited

Statutes

Rules

Texts

No. 18,724

IN THE

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Appellee.

BRIEF FOR APPELLANT

This is a consolidated appeal from orders granting summary judgment to appellee and denying appellant's subsequent motion for relief under Rule 60 (b) of the Federal Rules of Civil Procedure.

Following entry of the order granting summary judgment, appellant appealed to this court. The record was docketed on February 26, 1962. Thereafter, following the procedure outlined in *Creamette Co. v. Merlino* (9 Cir. 1961) 289 F. 2d 569 and *Greear v. Greear* (9 Cir. 1961) 288 F. 2d 466, appellant secured an order of the district court indicating its intention to entertain his motion under Rule 60 (b), Federal Rules of Civil Procedure and the record was remanded. Appellant's motion under Rule 60 (b) was denied by order entered on April 10, 1963. Ap-

pellant filed a timely notice of appeal from that order and the record of the proceedings on the Rule 60 (b) motion was docketed here on June 10, 1963. Thereafter, the record of the summary judgment proceeding was returned to this court and the two records consolidated for use on this appeal. The consolidated record contains the documents designated by the parties upon the appeal from the summary judgment and the subsequent appeal from the order denying relief under Rule 60 (b).

Appellant initiated this action on November 28, 1960 by filing in the district court for the Southern District of California, Southern Division, a petition (R 2-12)[1] under 45 U.S.C.A. 153 (p)[2] seeking enforcement of an award and order[3] of the First Divi-

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[1]References to the record on appeal will be by use of "R" plus page number. Where appropriate, the line referred to will be designated by number separated from page numbers by a colon mark.

[2]"If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner . . . may file in the District Court . . . a petition setting forth briefly the causes for which he claims relief, and the order of the Division of the Adjustment Board in the premises. Such suit in the District Court shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be prima facie evidence of the facts therein stated, * * *. The District Courts are empowered under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board." (45 U.S.C.A. 153 (p).)

[3]The award and order, dated October 2, 1956, and the interpretation, award and order dated October 8, 1958 were incorporated into the petition and are exhibits A and B thereto. (R 7-11.) The district court took the view "that the two awards and the two orders must be construed together as one award and one order, taking effect with the issuance of the second." (R 108:2.)

sion of the National Railroad Adjustment Board[4] which ordered appellant reinstated to active employment by appellee[5] with pay for time lost. The order of reinstatement was made on the basis of the finding of a majority of the members of a three physician panel established by the Board to the effect that on December 30, 1954, when the company disqualified appellant from active service because of alleged physical unfitness, he was, in fact, physically qualified to perform his duties as a locomotive engineer. The company's response to the petition was a motion for summary judgment, filed before answer and made on various grounds. (R 13-14.) This first motion for summary judgment was denied without prejudice to its renewal on the ground that the award and order sought to be enforced was made in excess of the Board's jurisdiction and, therefore, could not be the predicate of an enforcement proceeding.[6] (R 44.) Appellee then answered (R 56-63) and, simultaneously, moved a second time for summary judgment on said ground. (R. 66-67.) The district court found that the applicable collective bargaining agreement contained no limitation upon the carrier's right to remove and retire appellant from active service upon a finding

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[4]Hereinafter referred to as the "Board" or the "Adjustment Board".

[5]Appellee San Diego & Arizona Eastern Railway Company will be referred to herein, variously, as "SD&AE", "company" and "carrier". It is a wholly owned subsidiary of the Southern Pacific Company (R 259:28) operating between San Diego and El Centro, California. (Exhibit J, Schomp affidavit filed July 23, 1962, R 286.)

[6]The district court's opinion is found at R 45-55. It is reported at 192 F. Supp. 882.

by its physicians that he was physically disqualified (R 157-158) and concluded that the award and order of the Board was "erroneous and should be set aside".[7] (R 158-159.) It was the court's view that the Board, in establishing a three physician panel to review the decision of the company's chief surgeon, and in basing its award upon the finding of the majority of said panel, was creating and imposing upon the carrier a duty not to be found in the applicable collective bargaining agreement and, therefore, was acting in excess of its jurisdiction.[8] The court deemed that the pleadings, admissions and affidavits on file showed that there was no genuine issue as to any material fact and that the company was entitled to judgment as a matter of law.

Appellant's subsequent motion under Rule 60 (b) was predicated upon his discovery, after perfecting his appeal, of documentary evidence which indicated that the applicable collective bargaining agreement did, in fact, contain a provision for review of the decision of the company's chief surgeon by a three

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[7]The district court's findings of fact and conclusions of law are at R 155-159.

> "It is interesting to note that findings of fact and conclusions of law were prepared and signed. The theory of a summary judgment is that there are no disputed facts. We have seen findings of fact accompanying summary judgments . . . which while unnecessary, did provide a handy summary. *But all too often a set of unnecessary findings of fact is the tell-tale flag that summary judgment should not have been granted.*" (*Trowler v. Phillips* (9 Cir. 1958) 200 F. 2d 924, 926, emphasis added.)

[8]The opinion of the district court, with notes and appendix, is at R 105-154. It is reported at 198 F. Supp. 402.

physician panel, and upon evidence explaining his failure to discover same prior to the hearing on the motion for summary judgment. (R 184-185.)

On this appeal appellant will show that the order for summary judgment was erroneous because the pleadings and affidavits did not clearly establish the absence of a triable issue of fact and, also, that the order denying the motion for relief under Rule 60 (b) was erroneous because, under the circumstances, it constituted an abuse of discretion.

JURISDICTION

The court below had jurisdiction under the provisions of 45 U.S.C.A. 153 (p). This court has jurisdiction of this appeal under the provisions of 28 U.S.C.A. 1291.

STATEMENT OF THE CASE

On December 30, 1954, shortly after his seventy-first birthday, the company removed appellant from active service. (R 3, 57, 70.) Appellant had been employed by SD&AE since December 18, 1916—as a fireman until December 4, 1923 and, thereafter, as a locomotive engineer. (R 2-3, 56-57.) For many years during this long service and continuing to the date of such removal from active service, appellant was General Chairman for the Brotherhood of Locomotive

Firemen and Enginemen[9] and, of course, a member of that organization.[10] (R 99.) The designated collective bargaining agent for SD&AE's engineer employees during this period, however, was a rival organization, the Brotherhood of Locomotive Engineers.[11] Thus, the applicable collective bargaining agreement establishing the contractual rights and duties of the parties was the agreement between SD&AE and its engineer employees represented by the BLE. (R 39:28, 70:8.)

Upon attaining the age of seventy, appellant was required to submit to a physical examination each three months. (R 17:27, 70:29.) The findings upon examination on November 24, 1953 and each three months thereafter were, apparently, negative, but the findings upon examination of December 15, 1954 were, according to Mr. Schomp, the company's manager of personnel, that "Mr. Gunther's heart was in such condition that he would be likely to suffer an acute coronary episode." (R 70:28-71:9.)

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[9]Hereinafter referred to as "BLF&E".

[10]On page 83 of the "green colored booklet" (R 70:10; Exhibit A to the affidavit of K. K. Schomp filed May 16, 1961) appellant's name appears as "General Chairman, Brotherhood of Locomotive Firemen and Enginemen, S.D.&A.E.Ry" This booklet "Agreement—San Diego & Arizona Eastern Railway Company and Brotherhood of Locomotive Enginemen" indicates on its cover that it contains "Rules Effective March 1, 1935 . . . (and) . . . Revised Rates of Pay Effective October 1, 1937." On page 68 thereof appears the following: "Signed this 30th day of November, 1938."

This document, which the district court deemed to contain all of the terms of the applicable agreement as of the date of appellant's removal from active service, December 30, 1954, will be referred to herein as the "green booklet". It is found at R 19.

[11]Hereinafter referred to as "BLE".

Following said removal from active service, appellant submitted to an examination by a physician of his own choice and, upon the basis of that physician's favorable report, requested that "a three doctor board be appointed to reexamine his physical qualification for return to service." (R 7.) Initially, the Board denied his claim without prejudice. (R 7.) Appellant then obtained a supplemental report from his physician and resubmitted his claim. (R 7.) The result was an award establishing a three physician panel and stating:

> "If the decision of the majority of such board shall support the decision of carrier's chief surgeon the claim will be denied; if not, it will be sustained with pay pursuant to rule on the property from October 15, 1955, the date of the letter of Dr. Hall showing disagreement with the findings of disqualification by the company physicians." (R 8.)

Pursuant to this award, the parties agreed upon a board of three physicians and appellant was examined by the neutral member thereof whose report was favorable to appellant. According to the Adjustment Board,

> "the majority of said board properly examined claimant and their findings and decision therefrom did not support the decision of carrier's chief surgeon but they found and decided that claimant had no physical defects which would prevent him from carrying on his usual occupation as an engineer." (R 11.)

Nonetheless, the company did not interpret the Adjustment Board's findings as being favorable to appellant, and refused to reinstate appellant to active service or to award him back pay.

At this point, appellant initiated Action 2080-SD-W to enforce the award. He relied upon the award requiring the establishment of a three doctor panel and the written reports of two of the members thereof, his designee and the neutral member designated by agreement, to the effect that he was suffering from no disability which would prevent him from performing his assigned duties.[12] The carrier's motion for summary judgment upon the ground that the award did not have sufficient finality to confer jurisdiction upon the district court was granted.[13]

In an effort to invest the Board's award with the quality of finality demanded by the district court, appellant, once again, submitted his dispute with SD&AE to the Adjustment Board. The result was an interpretation and further award and order which issued on October 8, 1958. The Adjustment Board said:

> "We find from the record that the statements set out in claimant's submission are true; that a

---

[12]This was the previous action (Civil No. 2080-SD-W) referred to by carrier's manager of personnel in his affidavit filed November 28, 1960 (R 17:11) and by the district court in its opinion. (R 105:21.)

[13]The district court's opinion in Civil No. 2080-SD-W is reported at 161 F. Supp. 295. We note here, and will, again, *infra*, that the Court of Appeals for the Fifth Circuit in *Hodges v. Atlantic Coast R. Co.* (1962) 310 F. 2d 438, expressly rejected the rationale of this, the first *Gunther* case, and held such an award enforceable.

board of three physicians was selected by agreement of the parties for the purpose of determining claimant's physical qualification for service; that the majority of said board properly examined claimant and that their findings and decision therefrom did not support the decision of carrier's chief surgeon but that they found and decided that claimant had no physical defects which would prevent him from carrying on his usual occupation as engineer." (R 11.)

Thus, having determined that—

"(T)he issue of fact upon which the prior Award 17 646 was conditioned having been determined in favor of claimant, said conditional award should be made absolute and final and the claim sustained as therein provided.",

the Board made its award as follows:

"(C)laim sustained for reinstatement with pay for all time lost from October 15, 1955 pursuant to rule on the property.",

and ordered carrier to make said award effective on or before November 8, 1958. (R 11-12.)

On September 26, 1960, appellant initiated this action seeking an enforcement of said award and order of October 8, 1958. In his petition, he simply alleged that, as of December 30, 1954, his "employment with defendant was governed by the terms of the Agreement by and between the San Diego and Arizona Eastern Railway Company and its locomotive engineers represented by the Brotherhood of Locomotive Engineers." Further, he alleged that said agreement

did "not require employees covered by same to retire from active service at any stated age limit" and that "by the terms of the agreement . . . petitioner had seniority rights which entitled him to continue in the active service of defendant as a locomotive engineer." (R 3:6-15.) With respect to the physical disqualification, he alleged that it constituted "in fact, imposition upon petitioner of compulsory retirement in violation of petitioner's rights under the agreement" in that "(A)t said time petitioner's physical and mental fitness was comparable to that of men much younger than he and he was qualified physically to perform the duties which would be required of its locomotive engineers." (R 3:20-26.) He then set forth the facts relating to his resort to the Board and incorporated the results thereof, the award, as interpreted, in the form of exhibits thereto. (R 3-4.) He prayed for an order enforcing same. (R 5.)

In its answer, SD&AE admitted that petitioner's employment with defendant "was subject to the terms of a collective bargaining agreement by and between the San Diego and Arizona Eastern Railway Company and its locomotive engineers represented by the Brotherhood of Locomotive Engineers, and that there was no provision in said agreement relating to the age at which employees covered thereby should retire from active service;" and admitted that it removed appellant from active service on December 30, 1954; but denied that he had rights to continue in active service or that appellant was, at that time, qualified physically to continue in active service. (R 57.)

The pertinent allegations of the affidavits filed in support of, and in opposition to, the second motion for summary judgment were the following:

1. In December, 1954, ". . . the applicable written agreement was a green-colored booklet dated March 1, 1935." (Schomp affidavit filed May 16, 1961. R 70:9.)

2. "On December 30, 1954, there was no provision in the collective bargaining agreement applicable to the employment of Mr. Gunther providing for a three-doctor panel or for a medical review of any nature with respect to the findings of company physicians and surgeons relating to the physical qualifications of locomotive engineers to perform services." (Schomp affidavit filed May 15, 1961. R 70:15.)

3. There were "rules" some, but not all, of which were contained in the company's "Rules and Regulations of the Transportation Department"[14] which "must be complied with by the employees and are not a part of the collective bargaining agreement." (Schomp affidavit filed May 16, 1961. R 71:14-21.)

4. "Prior to and since December 30, 1954," the green colored booklet "has been the contract governing the employment of Mr. Gunther." (Schomp affidavit filed May 16, 1961. R 71:27.)

5. This "contract (the green booklet) contained no provision creating a three-doctor panel to review the physical condition of a locomotive engineer who

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[14]The booklet "Rules and Regulations of the Transportation Department" is Exhibit B to Mr. Schomp's affidavit filed May 16. It is found at R 72½.

has been removed from his position or restricted from performing service" until December 1, 1959, when, as a result of a demand made upon respondent by Mr. J. P. Colyar, General Chairman of the BLE, such a provision became effective by means of an "amending agreement." (Schomp affidavit filed May 16, 1961. R 71:27-72:10.)

6. Appellant, as General Chairman of the BLF&E, nonetheless was "for many years actively engaged in enforcing the provisions of the Agreement referred to in his petition" and "thoroughly familiar with said Agreement and its interpretation and application by the parties thereto in the operations of defendant." (Gunther affidavit filed May 29, 1961. R 99:24-31.)

7. Said agreement adopts the principle of seniority and provides:

> "Article 35—Seniority
>
> Section 1
>
> Rights of engineers shall be governed by seniority in service of the Company as engineers and seniority of the engineer as herein defined shall date from first service as an engineer.
>
> Section 3 (b)
>
> Where there is a surplus of engineers for the business of the district, the oldest engineer in point of seniority shall have the preference for employment." (Gunter affidavit filed May 29, 1961. R 100.)

8. Said agreement also adopts the principle of discharge only for good cause and states:

"Article 47—Investigations

Section 1 (b)

No engineer shall be suspended or discharged, except in serious cases, where a fault is apparent beyond reasonable doubt, until he has had a fair and impartial hearing before the proper officials.

Section 1 (e)

If an engineer is suspended or discharged and is proven to have been innocent of the offense charged, he shall be reinstated and paid rate as set forth in Appendix 'B' for time lost on such account."

9. That, with respect to reduction in force, said agreement provided:

"Article 38—Reduction of force

Section 1 (a)

When, from any cause, it becomes necessary to reduce the number of engineers on the engineers' working list, those taken off may, if they so elect, displace any fireman their junior under the following conditions:

Second: That when reductions are made they shall be in reverse order of seniority." (Gunther affidavit filed May 29, 1961. R 100.)

10. That the foregoing provisions were "vague, ambiguous and insufficiently certain to specify, in and of themselves, the precise rights of the employees covered thereby with respect to duration of employment and the rights, if any, of the employer to restrict same." (Gunther affidavit filed May 29, 1961. R. 100:28.)

11. "That at all times pertinent herein the interpretation of said provisions, and their application to defendant's operations, were done by reference to a long history of custom and practice in the railroad industry; that, for example, because the '. . . (R)ights of engineers . . . governed by seniority in the service of the Company . . .' were not specified in detail in said Agreement, their substance could only be, and was, determined by resort to custom and practice in the industry." (Gunther affidavit filed May 29, 1961. R 100:32-101:7.)

12. "That at all times pertinent herein it was the custom and practice for engineers covered by said Agreement to bid for and retain assignments to active duty on the basis of seniority; that, therefore, the most senior engineer was entitled to the assignment of his preference and, in the event of elimination of such assignment by reduction of work force or otherwise, such senior engineer had the right to displace a junior and thus continue in active employment; that defendant's removal of petitioner from the assignment of his choice on December 30, 1954 was in violation of petitioner's seniority rights as conferred by said Agreement because, at said time, petitioner was senior to the engineer who replaced him on said assignment and, for that matter, to all other engineers in the employ of defendant." (Gunther affidavit filed May 29, 1961. R 101:8-20.)

13. "That at all said times it was never the custom and practice for the active employment of an engineer covered by said agreement to be terminated by retire-

ment against the will of such engineer." (Gunther affidavit filed May 29, 1961. R 101:21-23.)

The trial court found the "collective bargaining agreement between plaintiff and *defendant's* Union, *Brotherhood of Locomotive Engineers*"[15] to be the green booklet. (Finding of Fact 4, R 156.) It held that the provisions according seniority rights and protection against discharge except for good cause cannot, as a matter of law, be deemed to restrict the "residual right" of respondent carrier to remove its engineer employees from active service upon an ex parte determination of physical unfitness.[16] It was the court's view that, because the green booklet is silent thereon, the carrier retained—had not "surrendered"—said right.[17] Despite the "bare bone" aspect of the green booklet (it contains, as the court noted, no reference to physical disability of engineers at all except a provision conferring a right upon engineers disabled by loss of one eye to displace juniors)[18] the court had "no difficulty" in interpreting its provisions as to seniority.[19] The court was not impressed with petitioner's contention that, since the terms of the agreement (not just the green booklet) relating to the rights of engineers to remain in active service,

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[15]The district court, obviously, intended this finding to read "between defendant and plaintiff's union." But the error of ascribing to Mr. Gunther membership in the BLE was not inadvertent. As late as the argument on the Rule 60(b) motion, the district court was still referring to the BLE as "petitioner's union".

[16]Opinion, Sept. 26, 1961. R 124 *et seq.*

[17]Ibid.

[18]Ibid. R 116.

[19]Ibid. R 119.

whether by reason of seniority rights, right to continue in service in absence of good cause for discharge, or otherwise, were far from clear, and since the circumstances, scope and bounds thereof were to be found "by reference to a long history of custom and practice in the railroad industry," petitioner should not be precluded from his opportunity to present evidence, extrinsic to the green booklet, at a trial upon the merits.

Finding, then, no limitation in the green booklet upon the carrier's residual right to disqualify its locomotive engineers from active service upon an ex parte determination of physical unfitness, the court held that the action of the Board in requiring the establishment of a three physician panel to be in excess of its jurisdiction to "interpret and apply" existing agreements.[20] Having thus concluded the award and order sought to be enforced was, in its view, a nullity, the court granted summary judgment because "there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law."[21]

Following the docketing of the appeal from the summary judgment, on or about Feb. 28, 1962 appellant's attorney attended a conference at the office

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[20]"The Board should have interpreted the Agreement as we have done here, and should have dismissed the claim prior to making its first, or conditional award." (Opinion of Sept. 26, 1961. R 132.)

[21]Opinion, Sept. 26, 1961 (R 134); Conclusions of Law 5 and 6 (R 153-154).

of J. P. Colyar, Chairman of the General Committee of Adjustment, BLE. At said conference said attorney learned, for the first time[22], the following:

1. That effective January 1, 1945, as a result of an exchange of correspondence[23] between SD&AE and the BLE, acting for the engineer employees of SD&AE, the carrier agreed to apply "interpretations made on articles in Pacific Lines Engineers' Agreement that are similarly worded in SD&AE Engineers' Agreement to SD&AE Engineers' Agreement."[24]

2. Also, as a result of said exchange of correspondence, a new provision, Article 9, Section 1 (c), identical to Article 12, Section 1 (c) of the Pacific Lines-BLE Agreement, was added to the SD&AE-BLE Agreement. Thus, as of January 1, 1945 the Pacific Lines-BLE Agreement and the SD&AE-BLE Agreement contained the identical provision:

> "Engineers assigned to regular runs, who through no fault of their own are not used thereon and their runs are worked in whole or in part, will be allowed the full mileage of their assignments."[25]

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[22]The affidavit of Charles W. Deeker, filed in support of appellant's Rule 60(b) motion, explains in some detail how he continued under the misapprehension that the green booklet was the entire written agreement until his conference with Mr. Colyar. (R 224-231.)

[23]Exhibits A through J to Colyar affidavit filed June 5, 1962 in support of appellant's Rule 60(b) motion. (R 193-208.)

[24]Exhibit H, Colyar affidavit filed June 5, 1962. (R 206.)

[25]Ibid. (R 204); Colyar affidavit filed June 5, 1962 (R 190: 15-18).

3. Effective October 2 or November 13, 1947, as a result of the adjustment of a grievance arising out of the claim of one C. O. Callaway, and memorialized in letters over the signatures of the Assistant General Manager and the Assistant Manager of Personnel of the Southern Pacific Company addressed to BLE officials, agreement was reached with respect to application of Article 12, Section 1(c) of the Pacific Lines-BLE Agreement as follows:

> "We further advised you, with the understanding that it is the Company's responsibility to prescribe physical standards required of employees to qualify them for service and to remain in service, that we were agreeable in any case where an engineer was removed from his position on account of his physical condition and he desires the question of his physical ability to conform to prescribed physical standards to be determined, the management was agreeable to setting up a special panel of doctors consisting of one doctor selected by the Company, one doctor selected by the employe or his representative, the two doctors thus selected to confer and appoint a third doctor specializing in the disease, condition or physical ailment from which the employe is alleged to be suffering. The management and the engineer will each defray the expenses of their respective appointee, and will each pay one-half of the fee and traveling expenses of the third appointee. This panel of doctors upon completing their examination will make a full report in duplicate, one copy each to be sent to the General Manager and the engineer. At the time of making the report a bill for the fee and traveling expenses,

> if there be any, of the third appointee shall be made in duplicate, one copy to be sent to the General Manager and one copy to the engineer."[26]

According to the affidavit of Mr. Colyar, this constituted an "interpretation" upon said Article 12, Section 1(c).[27]

4. That it was Mr. Colyar's opinion that, because of the foregoing, as of no later than November 13, 1947 and to and including December 30, 1954, the Agreement between the SD&AE and its engineers as represented by the BLE contained a provision specifically providing for resort to a three physician panel to determine an engineer employee's physical fitness to continue in active service, and,[28]

5. That the subsequent demand[29] by Mr. Colyar under date of August 28, 1959 for a new Section 3(a) of Article 68 of the SD&AE-BLE Agreement relating to a three physician panel for determining the physical fitness of engineer employees to continue in active service was not for the purpose of creating a new contractual right but "to clarify and make more explicit the existing provision" for such right.[30]

Upon learning the foregoing, appellant secured an order from the district court indicating its intention

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[26]Exhibits K and L, Colyar affidavit filed June 5, 1962. (R 209-210, 213.)

[27]Colyar affidavit filed June 5, 1962. (R 190:27.)

[28]Ibid. (R 191:16-29.)

[29]Exhibit M, Colyar affidavit filed June 5, 1962 (R 214-215); Exhibit C, Schomp affidavit filed May 16, 1961 (R 73).

[30]Colyar affidavit filed June 5, 1962. (R 192:2-11.)

to entertain his motion to be relieved from the operation of the summary judgment and thereby secured an order of this court remanding the record. Appellant's Rule 60(b) motion for relief from the operation of the summary judgment was heard on affidavits which included averments as to the facts set forth above and, additionally, averments of appellant explaining the circumstances which prevented him from knowing about the provisions for the three physician panel as created by the correspondence between the carrier and officials of the BLE. In his affidavit appellant emphasized that at no time was he a member of the BLE; that he did not have access to the correspondence which resulted in the establishment of the three-physician panel provision; that his knowledge of the SD&AE-BLE Agreement was limited to the contents of the green booklet and that he did not know of the correspondence establishing the three doctor panel method of resolving dispute as to physical fitness until he read Mr. Colyar's affidavit.[31]

On April 10, 1963, the district court made its order denying said motion. (R 319-320.) It was the court's view that appellant's failure to discover the correspondence in question was not justified; that "(R)ecourse to statements in affidavits filed by defendant is not necessary for us to see that petitioner has not produced and would be able to produce at trial any evidence which could lead to a determination in his favor.[32] The court reported that it could "find nothing

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[31]Gunther affidavit filed June 5, 1962. (R 220-222.)

[32]Opinion of March 29, 1963. (R 314:9-15.)

in the affidavits filed by petitioner or the exhibits attached to such affidavit, nor in any material presented by petitioner, to show that a three-physician panel was ever applicable prior to 1959, to engineers on the San Diego and Arizona Eastern Railroad."[33]

This appeal followed.

SPECIFICATION OF ERRORS

1. The district court erred in granting summary judgment for appellee because the pleadings and affidavits did *not* disclose that no genuine issue of fact remained for trial.

2. The district court erred in granting summary judgment for appellee because this case, involving the important public issue of the right of a railroad employee to enforcement of an award of the National Railroad Adjustment Board in his favor, which award was based upon the Board's interpretation and application of the applicable collective bargaining agreement, is not suited to disposition by summary judgment proceedings.

3. The district court erred in granting summary judgment for appellee because the award sought to be enforced was predicated upon the implied finding of the Board that, in terminating appellant's active employment, the carrier acted contrary to the terms of the applicable collective bargaining agreement. Since such finding, by statute, constitutes prima facie

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[33]Ibid. (R 314:27-32.)

evidence in support of appellant's petition, a factual issue existed for trial.

4. The district court erred in denying appellant's motion for relief under Rule 60(b) of the Federal Rules of Civil Procedure because the newly discovered evidence offered by appellant in support of said motion raised doubt as to whether the applicable collective bargaining agreement contained a provision consistent with the Board's interpretation of same and, under all the circumstances of this case, including appellant's explanation for his failure to discover said evidence prior to the grant of summary judgment, created good cause for grant of the relief requested by said motion.

ARGUMENT

I. RESUME OF FACTS.

Following some forty four years of service, appellant was removed from service as a locomotive engineer upon an ex parte determination by the carrier's physicians that he was a candidate for a heart attack. Having acted as General Chairman of the BLF&E for many years, he sought to assert what he deemed to be his rights as established by the applicable agreement—the agreement between the carrier and its engineer employees represented by the BLE. The result was an award of the National Railroad Adjustment Board, First Division, which, initially, established a three physician panel to determine the issue of appellant's physical fitness and, finally, unconditionally ordered

reinstatement with back pay. The court below, deeming the entire applicable agreement to be contained in the green booklet of November 30, 1938, found no ambiguity in its provisions relating to appellant's right to continued active employment and the carrier's corollary right to terminate such employment, interpreted same as placing no restriction upon the carrier's "residual right" to determine the physical fitness of its engineer employees, and concluded that the Board's award was *ultra vires* and, hence, unenforceable. It therefore granted the carrier's motion for summary judgment, holding that there was no issue as to any material fact and that the carrier was entitled to judgment as a matter of law.

II. TESTED BY THE RULES OF LAW APPLICABLE TO SUMMARY JUDGMENT PROCEEDINGS, THE JUDGMENT APPEALED FROM IS INFIRM. THE RECORD LEAVES DOUBT AS TO THE ABSENCE OF MATERIAL ISSUES OF FACT TO SUPPORT THE JUDGMENT OF THE DISTRICT COURT. ALSO, POLICY CONSIDERATIONS MILITATE AGAINST DISPOSITION OF THIS CASE BY SUMMARY JUDGMENT.

A. The applicable rules of law.

The rules controlling on motion for summary judgment are well settled and need not be elaborated upon here. The trial court's function is to determine whether a genuine factual issue exists; not to resolve any such issues. The Supreme Court has said recently:

> "Summary judgment should be entered only when the pleadings, depositions, affidavits and admissions filed in the case 'show that (except as

> to the amount of damages) there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.' Rule 56(c), Fed. Rules Civ. Proc. 28 U.S.C.A. This rule authorizes summary judgment 'only when the moving party is entitled to judgment as a matter of law. *When it is quite clear what the truth is,* * * * [and where] no genuine issue remains for trial * * * [for] the purpose of the rule is not to cut litigants off from their right of trial by jury if they really have issues to try.' *Sartor v. Arkansas National Gas Corp.,* 321 U.S. 620, 627 (1944)." *(Poller v. Columbia Broadcasting System,* (1962), 368 U.S. 464, 467, 7 L. Ed. 2d 458, 461; emphasis added.)

The moving party's burden of proof that there are no factual issues for trial is a heavy one.

> "On a motion for summary judgment the burden of establishing the nonexistence of any genuine issue of fact is upon the moving party, all doubts are resolved against him, and his supporting affidavits and depositions, if any, are carefully scrutinized by the court. * * * On appeal from an order granting a defendant's motion for summary judgment the circuit court of appeals must give the plaintiff the benefit of every doubt." (*Neff Instrument Corp. v. Cohu Electronics, Inc.* (9 Cir. 1959) 269 F. 2d 668, 673-674, quoting from *Walling v. Fairmont Creamery Co.* (8 Cir. 1943), 139 F. 2d 318, 322.)

It is error to grant such a motion if there is the "slightest doubt" as to whether there is a factual issue for trial.

> "We take this occasion to suggest that trial judges should exercise great care in granting motions for summary judgment. A litigant has a right to a trial where there is the slightest doubt as to the facts, and a denial of that right is reviewable; but refusal to grant a summary judgment is not reviewable. Such a judgment, wisely used, is a praiseworthy timesaving device. But, although prompt dispatch of judicial business is a virtue, it is neither the sole nor the primary purpose for which courts have been established. Denial of a trial on disputed facts is worse than delay. * * * The district court would do well to note that time has often been lost by reversals of summary judgments improperly entered." (*Cox v. American Fidelity & Casualty Co.* (9 Cir. 1957) 249 F. 2d 616, 618, quoting from *Doehler Metal Furniture Co. v. United States* (2 Cir. 1945) 149 F. 2d 130, 135.)

The appellate court reviews the record in the light most favorable to appellant. (*Poller v. Columbia Broadcasting System, Inc.* [1962] 368 U.S. 464, 473, 7 L. Ed. 2d 458, 464.)

Of particular application to the case at bar is the rule that the moving party has the burden of clearly establishing the lack of any triable issue of fact *by a record that is adequate for decision of the legal question presented.* Unless the record is clearly adequate the court should either grant a continuance so that the inadequacy may be corrected or deny the motion. (Moore's Federal Practice, Second Edition, Vol. 6, p. 2158.) Summary judgment is improper where the facts are meagre or where further inquiry into the

facts is desirable to clarify the application of the law. (Barron and Holtzoff, Federal Practice and Procedure, Rules Edition, Vol. 3, pp. 127-128; see *Boston & M. R. R. Co. v. Lehigh & N. E. R. Co.* [D.C. N.Y. 1960] 188 F. Supp. 486; *A. Smith Bowman & Sons Inc. v. Schenley Distillers* [D.C. Del. 1961] 190 F. Supp. 586.) Even where it can be said that an appellant failed to disclose a factual issue at the trial level in response to the moving papers of the moving party, but raises same on appeal,

> "if the appellate court becomes convinced that the appellant, acting in good faith, has somehow or other failed to raise at the trial court level a factual issue that is, nonetheless, present in the case, it should make such a disposition of the appeal as will permit him to do so." (Moore's Federal Practice, Second Edition, Vol. 6, p. 2365.)

Also of particular interest here is the rule that where the record presents a question of ascertaining the meaning of a contractual provision, summary judgment is improper if the contract is ambiguous and there is a factual issue as to its meaning, or if the parties have not integrated their agreement so that the parol evidence rule does not bar evidence extrinsic to a particular instrument of the actual agreement of the parties. Thus, in *Osborn v. Boeing Airplane Company* (9 Cir. 1962) this court said:

> "Where, as here, the existence and terms of a contract must be determined by drawing inferences of fact from all the pertinent circumstances, and the possible inferences are conflicting, the choice is for the jury." (309 F. 2d 99, 103),

and, in *International Union etc. v. American Zinc L. & S. Co.* (9 Cir. 1963), summary judgment was reversed, this court holding that the meaning to be attributed to the phrase "union membership clause", as it appeared in a collective bargaining agreement, was not so self-evident as to bar evidence outside the agreement itself to show what the parties meant by those words and, therefore, that there should be a trial to enable the parties to offer evidence in aid of their respective interpretations of the language. (311 F. 2d 656, 660.)

Finally, we call the court's attention to the authorities which hold summary judgment improper in cases involving constitutional or other large public issues which normally need the full exploration of a trial. In *Kennedy v. Silas Mason Co.* (1948), for example, the Supreme Court refused to decide a case involving application of the Fair Labor Standards Act upon a record provided by summary judgment proceedings. The court said:

> "We do not hold that in the form the controversy took in the District Court that tribunal lacked power or justification for applying the summary judgment procedure. But summary procedures, however salutary where issues are clear cut and simple, presents a treacherous record for deciding issues of far flung import on which this court should draw inferences with caution from complicated courses of legislation, contracting and practice.
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> "We consider it the part of good judicial administration to withhold decision of the ultimate questions involved in the case until this or an-

> other record shall present a more solid basis of findings based on litigation or on a comprehensive statement of agreed facts." (334 U.S. 249, 256-257, 92 L. Ed. 1347, 1350-1351.)

We will describe in more detail below the circumstances of this case which bring it within the ambit of this rule.

B. The pleadings presented a factual issue as to whether appellant's removal from active service was in violation of his seniority rights or in violation of his right to continued active employment in the absence of good cause for discontinuance thereof. The affidavits filed upon motion for summary judgment did not extinguish this issue.

In his petition for enforcement of the Board's award appellant alleged that his employment "was governed by the terms of the Agreement by and between the San Diego & Arizona Eastern Railway Company and its locomotive engineers represented by the Brotherhood of Locomotive Engineers." (R 3:6.) (This court will note that he did *not* allege the agreement to be a written agreement nor did he refer to any particular instrument. He also alleged that the "Agreement does not require employees covered by same to retire from active service at any stated age limit" (R 3:10), and that "at all times . . . petitioner had seniority rights which entitled him to continue in the active service of defendant as a locomotive engineer." (R 3:12.) He alleged further that "on December 30, 1954, shortly after petitioner's seventy first birthday, defendant removed petitioner from active service on the ground that he was not

physically qualified to perform the duties of locomotive engineer" (R 3:17), but that "(A)t said time, petitioner's physical and mental fitness was comparable to that of men much younger than he and he was qualified physically to perform the duties which defendant required of its locomotive engineers." (R 3:20.) Further, he alleged that "(S)aid disqualification of petitioner by defendant was, in fact, imposition upon petitioner of compulsory retirement in violation of petitioner's rights under said Agreement." (R 3:23.) Finally, he alleged that "(B)y reason of the premises, petitioner has been deprived of his right, pursuant to said Agreement, to continue in the active service of defendant as a locomotive engineer since December 30, 1954, and has thereby sustained a wage loss to the date hereof in the approximate amount of $50,000.00." (R 4:30.)

In addition, he incorporated into his petition the finding of the Adjustment Board, with respect to the applicable agreement, that—

> "It is true that the carrier has the right and responsibility of determining within proper limits the physical fitness of employes to remain in service. It is also true that the employe has the right to priority in service according to his seniority *and pursuant to the agreement* so long as he is physically qualified. Where these two rights come into collision it has consistently been held by this Division that it has jurisdiction to determine whether the employe has wrongfully been deprived of service." (R 7-8, emphasis added.)

Appellee's answer admitted that appellant's enployment was subject to the terms of a collective bargaining agreement as alleged by appellant and that "there is no provision in said agreement relating to the age at which employees covered thereby should retire from active service." (R 57:6.) It denied that appellant had seniority rights which entitled him to continue in active service (R 57:16); admitted that it removed him from active service on December 30, 1954 "upon advice of the Chief Surgeon that petitioner had been physically disqualified from performing such service after physical examination." (R 57: 16.) Appellee denied appellant's "allegation that he was qualified physically to perform the services required of him (R 57:20); that said disqualification constituted imposition upon appellant of compulsory retirement in violation of his rights under the agreement (R 57:20); and that appellant had been deprived of his rights pursuant to the agreement to continue in active service from and after December 30, 1954. (R 57:20.)

Thus, the pleadings presented a factual issue, to wit: was appellant, on December 30, 1954, qualified physically to perform the duties of locomotive engineer and, if so, was his disqualification by appellee in violation of his rights under the agreement?

1. **The green booklet purporting to be the applicable agreement as of November 30, 1938 filed in support of the motion for summary judgment is, clearly, not the entire applicable agreement as of December 30, 1954, or, at the very least, creates uncertainty and is ambiguous in this regard and with regard to the rights of engineers alleged by the carrier to be physically disqualified for active service. Accordingly, the district court erred in determining therefrom that, as of December 30, 1954, appellant did not have a contractual right to continue in active service if he, in fact, was physically qualified to do so.**

On the motion for summary judgment which led to the judgment from which this appeal is taken, appellee sought, by affidavit of its manager of personnel, Mr. K. K. Schomp, to extinguish the factual issue presented by the pleadings by placing the green booklet before the court and asserting that "on December 30, 1954, there was no provision in the collective bargaining agreement applicable to the employment of Mr. Gunther providing for a three-doctor panel or for a medical review of any nature with respect to the findings of Company physicians and surgeons relating to the physical disqualification of locomotive engineers to perform service." (R 70:15.) But the attempted demonstration failed, because Mr. Schomp's affidavit makes it abundantly clear that the green booklet, Exhibit A thereto, did not contain the entire agreement of the parties as of December 30, 1954. Therefore, from the absence of any provision therein specifically limiting the carrier's right to determine the physical qualifications of its employees, the court could not infer there was no such provision anywhere in the applicable agreement.

It is interesting to note that Mr. Schomp's affidavit leaves us in doubt as to where the collective bargaining agreement is to be found. He states: "In December, 1954 the applicable *printed* agreement was a green colored booklet dated March 1, 1935." (R 70:10.) He then tells us that the Company "has published a number of rules concerning its operations, the conduct and safety of its employees, physical examinations and standards and other subjects" and that these rules "must be complied with *and are not a part of the collective bargaining agreement.* (R 71:20.) Then he reveals that all of the terms of the applicable agreement are not to be found in the "applicable printed agreement" (R 70:9-10) by showing that, effective December 1, 1959 the existing agreement was amended as a result of a written demand made pursuant to the Railway Labor Act (R 72:3; Exhibit C to Schomp affidavit filed May 16, 1961, R 73-74) and that said amendment is evidenced by a written memorandum signed by Mr. Schomp and Mr. Colyar and *not by its incorporation into the "applicable printed agreement."* (Exhibit D to Schomp affidavit filed May 16, 1961, R 75-76.)

But the conclusive evidence that the green booklet was not the entire agreement of the parties as of December 30, 1954 is the booklet itself. It is inconceivable that the collective bargaining agreement could have undergone no changes from November 30, 1938 until December 30, 1954. The booklet contains no provision for expiration of the agreement's term; instead Article 68 provides that it shall "continue in effect

. . . until either party desiring to change any of the foregoing rules or regulations shall have given notice in writing of the change or changes desired." (Green booklet, p. 82.) The continuous negotiation method of collective bargaining in the railroad industry is also evidenced by Article 66 of the green booklet which provides that "all controversies affecting locomotive engineers will be handled in accordance with the *recognized interpretations* of the Engineer's contract as agreed upon between the Committee of the Brotherhood of Locomotive Engineers and the Management", and that "(I)n matters pertaining to discipline, *or other questions not affecting changes in the Engineer's contract*, the officials of the Company reserve the right to meet any of their employees whether individually or collectively." (Green booklet, p. 81.)

It is obvious, we submit, that the green booklet did not, as the district court mistakenly concluded, contain all of the terms of the applicable agreement. Other provisions were to be found in other documents reflecting changes resulting from demands under Article 68 and interpretations as referred to in Articles 66 and 67. Not having the entire agreement before it, the district court could not find, as it did, that "said collective bargaining agreement . . . contained no provision limiting the right of defendant to remove and retire plaintiff from active service upon a finding by defendant's physicians that plaintiff was physically disqualified from active service." (R. 157: 28), or that "said collective agreement contained no provision for a board of physicians to review the

findings of defendant's physicians as to physical disqualification of its employees." (R 158:3.)

A further doubt as to the soundness of the lower court's conclusion that "there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law (R 159:4) is raised by the allegations of appellant's affidavit, and the other evidence, on the subject of the ambiguity created by the contents of the green booklet. The district court rejected appellant's assertion that the provisions of the booklet relating to seniority and establishing his right to continued service in the absence of good cause for removal therefrom are "vague, ambiguous and insufficiently certain to specify, in and of themselves, the precise right of the employees covered thereby with respect to duration of employment and the rights, if any, of the employer to restrict same" (R 100:28), and that "the interpretation of said provisions, and their application to defendant's operations, were done by reference to a long history of custom and practice in the industry." (R 100:32-101:3.) The district court reported "no difficulty in ascertaining the meaning of seniority as it appears in this Agreement" (R 119:24) and deemed the seniority provisions to have no restrictive effect upon the company's right to remove appellant from active service. (R 124:6.) Likewise, the provision conferring upon employees the right not to be suspended or discharged, he found, was without limiting effect upon said "residual right". (R 124:6.)

The lower court arrived at these conclusions only by interpreting the language of the green booklet. On motion for summary judgment, it could do this only if the booklet was an integrated, and non-ambiguous, expression of the entire agreement of the parties. We have already shown that it was not the entire agreement of the parties. We suggest here that, even if it be deemed the entire agreement, the booklet itself, when read in the light of appellant's characterization of its provisions as vague, ambiguous and insufficiently certain, is, clearly, not the type of integrated and unambiguous instrument which would bar parol evidence as to its meaning and, therefore, support summary judgment.

We are concerned here with the respective rights and duties of the parties in the event of a dispute as to the employee's physical qualification to continue in active service. The only reference in the green booklet to physical disability is found in Article 29 where we learn that "(W)hen an engineer is physically disabled on the account of loss of the sight of one eye, and is required to give up his run, he will have the privilege of displacing any engineer his junior in branch service." (Green booklet, p. 65.) Is is reasonable to infer from this that, on the entire question of the rights of allegedly disabled employees, the parties chose to confine their agreement to making provision only for those employees suffering the loss of one eye? Or, is it more reasonable to infer that, in the railroad industry, it is not the custom to in-

corporate into a single instrument all matters upon which agreement has been reached but, instead, to rely, in part, upon materials extrinsic to the printed booklet in asserting contractual rights and duties? We deem the latter inference the more reasonable and conclude that, at the least, ambiguity exists which requires resort to evidence extrinsic to the "bare bone" booklet in order to ascertain what was the agreement of the parties on this subject.

2. The presumptive validity of the Board's finding, incorporated into appellant's petition, that "pursuant to the agreement" appellant had a right to continue in service "so long as he is physically qualified" was not rebutted and, indeed, could not be rebutted, on the motion for summary judgment. Implicit in the Board's award is its finding that, because appellant was, in fact, qualified physically to continue in service on December 30, 1954, the carrier suspended him from further service without cause, or acted arbitrarily or in bad faith. Accordingly, the district court erred in granting summary judgment and depriving appellant of the right to present these findings and other evidence in support of his claim against the carrier to the trier of fact.

We have demonstrated above how the district court fell into error by assuming the green booklet to constitute the entire applicable agreement. In making this argument we have assumed, *arguendo*, that unless there was a contractual provision for a three physician panel in effect on December 30, 1954, the Board's award may not be the predicate of this enforcement action.

However, as the following discussion will show, the capacity of the award to support this enforcement action is not dependent upon there being such a pro-

vision in the applicable agreement. This follows from the fact that the applicable agreement prohibited discharge or suspension without good cause therefor. (Green booklet, p. 74.)

The issue before the Board, and therefore, before the district court, was whether appellant had been removed from active service *for good cause.* Unquestionably the Board had jurisdiction of this question arising under the collective bargaining agreement. The carrier's position before the Board was that appellant had been removed from active service for cause because he was not physically qualified for such service. The Board, not being composed of experts in medicine, was required to obtain the opinions of such experts in order properly to dispose of this question. In *Hodges v. Atlantic Coast R. Co.* (1962), 310 F. 2d 438 the Court of Appeals for the Fifth Circuit clearly recognized the necessity of this procedure. It therefore upheld an Adjustment Board order establishing a three physician panel although the collective bargaining agreement did not contain any specific provision for same. The Court of Appeals in *Hodges* also properly tells us that the Board could use the findings of the medical panel in making a determination on the ultimate issue before it as to whether the employee had been discharged by the carrier in violation of the "cause" provisions of the contract, or whether the carrier had acted arbitrarily. Certainly, where the bargaining agreement limits management's rights to discharge or suspend for cause, the body having jurisdiction over the dispute, here

the Adjustment Board, may order the reinstatement of the employee if the carrier's action is erroneous, arbitrary or in bad faith. (*Tinnon v. Missouri Pac. R. Co.* (8 Cir. 1960), 282 F. 2d 773. And in making that determination, the Board is not required to accept management's investigation and basis for making the discharge or rendering the discipline as being determinative of the issue. (*Martin v. Southern Ry. Co.* (S.Ct.S.Car.1962), 126 S. E. 2d 365.) In effect, the court's decision herein bars the Board from making any determination on the questions submitted to it.

By describing the issue in terms of the Board's jurisdiction to invoke the expert services of physicians in reaching its ultimate finding and by gratuitously conferring on management the prerogative of making a final determination in this area, the lower court violated the principles set forth above and fatally overlooked the basic issue before it and the Board. By emphasizing the lack of a medical panel provision, as it interpreted the applicable agreement, and by holding that this was the deciding factor as to the jurisdiction of the Board, the lower court failed to accord the findings of the Board the weight vested in them by Section 153, First (p) of the Railway Labor Act, and further failed to permit appellant the right to rely upon the Board's finding that the carrier had failed to remove appellant from active service for good cause and had acted arbitrarily, in bad faith, and in violation of the collective bargaining agreement.

Beyond this, the decision of the lower court improperly infringed on the Board's powers as an arbitrator as such powers have been defined in recent decisions of the United States Supreme Court. As this court is well aware, the Adjustment Board is an arbiter created by Section 3, First (i) of the Railway Labor Act to settle or adjust disputes growing out of grievances. (*Brotherhood of R. Trainmen v. Chicago River & Indiana R. Co.* (1957) 353 U.S. 30, 1 L. Ed. 2d 622.) Although the arbitration rendered by the Board is a statutory creation, agreements in other industries contain arbitration provisions which have been held enforceable under Section 301 of the Labor-Management Relations Act, 29 U.S.C. 185. (*Textile Workers v. Lincoln Mills* (1957) 353 U.S. 488, 1 L. Ed. 2d 972. Many of the problems confronting this court have been met previously in these cases. Some were resolved in the so-called Steelworkers Trilogy. (*United Steel Workers v. Enterprise Wheel & Car Corp.* (1960) 363 U.S. 593, 4 L. Ed. 2d 1424; *United Steelworkers v. American Mfg. Co.* (1960) 363 U.S. 564, 4 L. Ed. 2d 1403; *United Steelworkers v. Warrior & Gulf Nav. Co.* (1960) 363 U.S. 574, 4 L. Ed. 2d 1409.

By basing its decision on its interpretation of the applicable agreement, and deciding that the agreement did not prohibit discharge upon the ground of physical disability because it contained no specific provision limiting the carrier's right to determine the physical fitness of its employees, the lower court disregarded the Supreme Court's pronouncements in the

Steelworker Trilogy. The court in this case, as did the lower courts in *United Steelworkers v. American Mfg. Co.,* supra, showed a preoccupation with ordinary contract law in reaching its decision. In taking this position, the district court erroneously concluded that appellant's claim before the Adjustment Board was not meritorious and that the Adjustment Board lacked jurisdiction over the dispute. In the *American Mfg. Co.* case the collective bargaining representative had sought to arbitrate a grievance requesting reinstatement of an employee on the basis of the seniority provisions of the agreement. The employee had been injured on the job and in a workmen's compensation proceeding had been determined to be permanently partially disabled. The company took the position that it had not violated any of the seniority provisions of the agreement by refusing to reinstate the employee because of his physical disability. The lower courts, agreeing that the dispute was not subject to arbitration under their interpretation of the bargaining agreement, refused to compel arbitration. The Supreme Court, however, reversed on the ground that the collective bargaining agreement called for submission of all grievances to arbitration, not merely those that the court might deem to be meritorious. The court stated:

> "When the judiciary undertakes to determine the merits of a grievance under the guise of interpreting the grievance procedure of collective bargaining agreements, it usurps a function which under the regime is entrusted to the arbitration tribunal." (363 U.S. 564, 569, 4 L. Ed. 2d 1403, 1407.)

In the instant case, the court, by searching the contract for a specific provision for a medical panel, rendered a decision on the merits as to the meaning, interpretation and application of the collective bargaining agreement. In doing so, it erroneously limited and invaded the jurisdiction of the Adjustment Board, a body with jurisdiction commensurate with that of the arbitration board involved in the *American Mfg. Co.* case. By taking the position which it reached in its decision, the court specifically disregarded the explicit provisions of the bargaining agreement which were before the Board for decision, to wit, the seniority and just cause provisions.

By holding that the lack of specific provision for a medical panel placed discharges for medical reasons within the sole and exclusive prerogative of management, the court improperly excepted the dispute before the Board from arbitration. The validity of a similar adjudication was before the Supreme Court in the *Warrior and Gulf Nav. Co.* case. There, the bargaining representative protested the employer's practice of contracting out work performed by its employees. Although no specific contractual provision covered the situation, the union requested that it be submitted to arbitration under the grievance procedures of the collective bargaining agreement. The employer refused to arbitrate, contending that the contract excluded from arbitration matters which were strictly a management function. The lower court, looking to the contractual provision in regard to managerial rights and to the merits of the dispute,

held that the collective bargaining contract did not permit arbitration. The Supreme Court, however, held that only the specific exclusion of the matter from arbitration could deprive the arbitrator from jurisdiction. The court said that the lower courts were not entitled to look at the merits of the dispute; that it was the arbitrator who was to determine whether the agreement had been violated. In the case at bar the lower court, by dealing with the case on summary judgment, impinged on the jurisdiction of the Board. It prevented the appellant from implementing the Board's holding that his discharge was not for good cause as the Board's interpretation of the applicable agreement had caused it to find. We submit that this ruling violates the premises set forth in *Warrior and Gulf Nav. Co.*

Lastly, the Supreme Court ruled in *Enterprise Wheel* that, by providing for a grievance procedure terminating with arbitration, the parties submit to the arbitrator's construction of their agreement. It was held that the court should not overrule the arbitrator's construction of the contract because its interpretation of the contract differs from that of the arbitrator. Although it has been stated by some courts that in an action to enforce an Adjustment Board award the district court may re-try the findings of fact *de novo,* it has never held that the Board's decision as to the proper construction of the applicable agreement is not final in the absence of a showing that it is arbitrary or in violation of due process. Here, the district court has erroneously assumed this

power. By doing so it has reviewed the merits of the Board's construction of the contract, has invaded the peculiar jurisdiction of the Board, and has not accorded to the Board the expertize to which it is entitled. (*Washington Terminal Co. v. Boswell* (D.C. D.C. 1941) 124 F. 2d 235.)

If the Adjustment Board is to function in accordance with the Supreme Court's pronouncements on the subject of arbitration, it must be treated akin to arbitrators who are within the purview of the Steelworkers Trilogy. In fact, in *Brotherhood of Locomotive Engineers v. Louisville & N. R. Co.* (1963) 373 U.S. 33, 10 L. Ed. 2d 172, 179, Justice Goldberg, in dissent, interpreted the majority opinion as follows:

> "Given the premises of *Chicago River,* it must follow that such enforcement proceedings are governed by federal law as declared by this court in cases such as *Steelworkers v. American Mfg. Co.,* 363 US 564; *Steelworkers v. Warrior & Gulf Nav. Co.,* 363 US 574; and *Steelworkers v. Enterprise Corp.,* 363 US 593, * * *."

Following these precepts, the lower court could do no less than to hear this case on its merits. It is submitted that if these ground rules had been followed, the lower court could not have found on summary judgment for the carrier. If the court had traveled the course set by the Court of Appeals in *Hodges v. Atlantic Coast R. Co.,* supra, the court could only have found that the Board's award and order is valid and enforceable herein.

3. **In this lawsuit involving the judicial reception to be accorded to findings, award and order of the National Railroad Adjustment Board, policy considerations militate against disposition of same by summary judgment. This is particularly true in the light of recent Supreme Court decisions which limit the aggrieved railroad employee to his remedy before the Board and, if the carrier refuses to comply with an award in his favor, to the enforcement proceeding in federal court.**

We have previously noted the authority for the proposition that there are factual situations which do not lend themselves to disposition by summary judgment. The following is submitted in support of our contention that this is such a case.

In 1934 the Railway Labor Act was amended to provide for compulsory arbitration of disputes arising under collective bargaining agreements in the railroad industry.[34] The Board's awards were made "final and binding" except insofar as they contained a money award.[35] Provision was made for enforcement of same by an action in federal district court.[36]

[34]For discussion of the statutory scheme, legislative history, etc. see *Union P. R. Co. v. Price* (1959) 360 U.S. 601, 79 S. Ct. 1351, 3 L. Ed. 2d 1460; *Pennsylvania R. Co. v. Day* (1959) 360 U.S. 548, 79 S. Ct. 1322, 3 L. Ed. 2d 1422; *Brotherhood of R. Trainmen v. Chicago River & I. R. Co.* (1957) 353 U.S. 30, 77 S. Ct. 635, 1 L. Ed. 2d 857; *Slocum v. Delaware & L. R. Co.* (1950) 339 U.S. 239, 70 S. Ct. 577, 94 L. Ed. 795; *Order of Ry. Conductors v. Pitney* (1946) 326 U.S. 561, 66 S. Ct. 322, 90 L. Ed. 319; *Elgin J. & E. R. Co. v. Burley* (1945) 325 U.S. 711, 65 S. Ct. 1282, 89 L. Ed. 1887; *Washington Terminal Co. v. Boswell* (D.C. D.C. 1941) 124 F. 2d 235.

[35]"The awards of the several divisions of the adjustment Board shall be stated in writing, a copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute, except insofar as they shall contain a money award. In case a dispute arises involving an interpretation of the award, the division of the Board upon request of either party shall interpret the award in the light of the dispute." (45 U.S.C.A. 153(m).)

[36]Note 2, *supra*, p. 2.

Since then judicial reception to such awards has been ambivalent. Some courts have demonstrated reluctance to grant to the Board the "expertize adapted to interpreting such agreements."[37] Thus, awards not formulated in terms of finality comparable to judicial findings have been rejected when made the basis for enforcement proceedings.[38] Other and, we submit, more enlightened courts have granted to the work of the Board the weight which Congress intended. A good example of this is *Kirby v. Pennsylvania R. Co.* (3 Cir. 1951) 188 F. 2d 793. There, Goodrich, J., in reversing the lower court's rejection of an award upon the ground that it was too vague to be enforced, said: "We think courts should take the findings of these divisions of the Railroad Adjustment Board as they come and do what they can with them". (188 F. 2d 793, 796.) Another such example is *Hodges v. Atlantic Coast Line R. Co.* (5 Cir. 1962) 310 F. 2d 438. In that case the district court had refused enforcement to an award establishing a three physician panel in reliance, no doubt, upon the authorities cited

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[37]"Furthermore, the Board is acquainted with the established procedures, customs and usages in the railway labor world. It is the specialized agency selected to adjust these controversies. Its expertise is adapted not only to interpreting a collective bargaining agreement, but also to ascertaining the scope of the collective agent's authority beyond what the Act itself confers, in view of the extent to which this also may be affected by custom and usage." *(Elgin J. & E. R. Co. v. Burley* (1946) 327 U.S. 661, 664, 90 L. Ed. 928, 932.)

[38]See *Railroad Yardmasters of North America, Inc. v. Indiana Harbor Belt R. Co.* (7 Cir. 1948) 166 F. 2d 326; *System Federation etc. v. Louisiana & A. R. Co.* (5 Cir. 1941) 119 F. 2d 509; *Smith v. Louisville & N. R. Co.* (S.D. Ala. 1953) 112 F. Supp. 388; *Gunther v. San Diego & Arizona Eastern R. Co.* (S.D. Cal. 1958) 161 F. Supp. 295.

in note 38 *supra*. The Court of Appeals, however, expressly rejecting the rationale of those authorities, reversed and instructed the district court to retain jurisdiction of the cause pending final award of the Board based upon the findings of the three doctor board. (Thus, an ironic aspect of appellant's long struggle to implement the relief granted him by the Board is that he is now informed by the Court of Appeals for the Fifth Circuit that the district court should not have granted the company's motion for summary judgment in action 2080-SD-W.)

We urge that the more charitable view of the work of the Board exemplified by *Kirby* and *Hodges* is the correct one, particularly so in view of recent decisions of the Supreme Court which have the effect of severely restricting the area in which the aggrieved railroad employee can seek adjudication of his claim, and the power of his union to take economic action to force recognition of it.

It is now established that an award in favor of the carrier, for example, one denying relief to a railroad worker seeking reinstatement with back pay, is not a "money award" and, therefore, is "final and binding" and the aggrieved employee "is wholly without further remedy or recourse".[39] The carrier is under no such disability, however, for if the award is in the employee's favor, not only may the carrier force ju-

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[39] *Union P. R. Co. v. Price* (1959) 360 U.S. 601, 79 S. Ct. 1351, 3 L. Ed. 2d 1460. See dissenting opinion of Goldberg, J. in *Locomotive Engineers v. Louisville & N. R. Co.* (1963) 373 U.S. 33, 10 L. Ed. 2d 172, 181.

dicial review by refusing to comply with same thus requiring the employee to sue under 45 U.S.C.A. 153 (p), but, in addition, and because of the availability to the employee of the Section 153 (p) action, he may not take concerted action with his fellow employees to force the carrier to comply.[40] The importance to the employee of the Section 153 (p) proceeding is further enhanced by the rule that only the Board may order reinstatement. Thus, an employee whose employment is wrongfully terminated by the carrier may not seek reinstatement in a common law action. He must elect to treat the wrongful discharge as final and sue the carrier for damages in the form of future wage loss. In such a suit he may find himself barred by his failure to follow the grievance procedures provided for by the applicable agreement.[41]

Thus, except for the limited area wherein a wrongfully discharged railroad worker can elect to treat his employment as terminated and seek damages for future wage loss, he is totally dependent upon the Board for redress. And, if he secures a favorable award, because of the rule permitting the enjoining of concerted action to secure its enforcement, he is totally dependent upon the federal district court in the event the carrier chooses to disregard the Board's mandate.

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[40] *Locomotive Engineers v. Louisville & N. R. Co.* (1963) 373 U.S. 33, 10 L. Ed. 2d 172.

[41] *Pennsylvania R. Co. v. Day* (1959) 360 U.S. 548, 3 L. Ed. 2d 1422. See *Moore v. Illinois Central R. Co.* (1941) 312 U.S. 630, 85 L.Ed. 1089; *Slocum v. Delaware, L. & W. R. Co.* (1950) 339 U.S. 239, 94 L.Ed. 795; *Transcontinental Air, Inc. v. Koppal* (1953) 345 U.S. 653, 97 L.Ed. 1325.

We submit that these considerations should move federal district courts, in the tradition of *Kirby* and *Hodges* to regard Section 153 (p) actions as *sui generis* and to give to the award sought to be enforced no less credit than the prima facie value with which the statute endows it. We note here again, that, by the terms of the statutes, "the findings and order of . . . the Adjustment Board shall be prima facie evidence of the facts therein stated."[42] In the award here sought to be enforced there is a specific finding by the Board that it had jurisdiction (R 7) and that it had the power to adjudicate the dispute before it by resort to a three doctor panel to review the findings of the carrier's physicians. (R 7-8.) The presumptive validity of these findings, we submit, creates a factual issue on the question of the jurisdiction of the Board to make the award in question which precluded summary judgment.

III. THE DISTRICT COURT'S DENIAL OF RELIEF UNDER RULE 60(b) CONSTITUTED AN ABUSE OF DISCRETION.

We have set forth above the events which followed entry of summary judgment for the company. Appellant's counsel, at a conference with Mr. J. P. Colyar, General Chairman, BLE, in San Francisco was advised by Mr. Colyar that, as a result of negotiations with the officials of the Southern Pacific Company and

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[42]45 U.S.C.A. 153(p), Note 2, *supra.*

its wholly owned subsidiary, SD&AE,[43] agreement had been reached to utilize a three doctor panel to resolve disputes as to whether an engineer employee was qualified physically for active service. Mr. Colyar provided counsel for appellant with copies of correspondence which confirmed his contention that the SD&AE-BLE agreement contained such a provision as early as October 2, 1947.

Mr. Colyar's views, and the confirmatory evidence to support same, were presented to the district court together with affidavits of appellant and his attorney in explanation of their failure to discover same prior to summary judgment.

Rule 60 (b), Federal Rules of Civil Procedure provides, in part, as follows:

> "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59 (b); * * * or (6) any other reason justifying relief from the operation of the judgment. * * *"

Appellant's motion, made approximately eight months after entry of the summary judgment and

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[43]In negotiating with the Southern Pacific Company and with its wholly owned subsidiary. SD&AE, Mr. Colyar talks to the same individual. Mr. Schomp, according to his affidavit filed July 23, 1962, is personnel manager for Southern Pacific and, also, SD&AE. (R 259.)

approximately three months after discovery by appellant of the evidence which he brought to the court's attention by means of said motion, was made upon grounds (1), (2) and (6) of the Rule.

The rules applicable to such motions, and review of denial of same, are set forth in the following quote from *Petition of Devlas* (S.D. N.Y. 1962) 31 F.R.D. 130.

> "The tenor of the cases decided under Rule 60 (b) makes it clear that this motion is equitable in nature and appeals to the conscience of the court. Serio v. Badger Mutual Insurance Co., 266 F. 2d 418, 421 (5th Cir. 1959), cert. denied 361 U.S. 832, 80 S. Ct. 81, 4 L. Ed. 2d 73 (1959): 'The rule is to be liberally construed in order that judgments may reflect the true merits of a case.' Consolidated Gas & Equipment Co. of America v. Carver, supra, 257 F. 2d at p. 104: '(T)he rule is to be liberally construed as a grant of power to a court to vacate a judgment when such action is appropriate to accomplish justice.' Huntington Cab. Co. v. American Fidelity & Casualty Co. 4 F.R.D. 496, 498 (S.D. W. Va. 1945); 'The courts have given this rule [60 (b)] a liberal construction, always trying, when possible, to see that cases are decided on their merits.' Pierre v. Bermuth, Lemke Co., 20 F.R.D. 116 (S.D.N.Y. 1956), in which Judge Bryan quotes with approval from 7 Moore, Federal Practice, p. 308 (2d ed. 1950): 'This provision is a grant reservoir of equitable power to do justice in a particular case.' See Fiske v. Buder, 125 F. 2d 841 (8th Cir. 1942); 3 Barron & Holtzoff, Federal Practice and Procedure, Rules Ed., 392, 1332."

In a double barreled rejection of appellant's motion, the district court "found *nothing* in the record to justify petitioner's failure to discover and present to the court prior to the rendition of judgment the evidence he now proffers" (R 314), and, in any event, held that "(R)ecourse to statements in affidavits filed by the defendant is not necessary for us to see that petitioner has not produced *and would not be able to produce at a trial,* any evidence which could lead to a determination in his favor." (R 314.)

It is true that the company was able to show that Mr. Colyar wrote to SD&AE about its intentions with respect to the Board's award in appellant's favor in 1958 and that on March 29, 1960 appellant authorized Mr. Colyar to assert against the carrier his claim to reinstatement and back pay pursuant to said award. But this circumstantial evidence is insufficient to rebut the sworn statements of appellant and his counsel denying knowledge of the correspondence establishing the provision for a three physician panel until the conference of February 28, 1962 and affirming their lack of access to the files containing such correspondence. The intracacies of inter-union rivalry and labor-management relations in the railroad industry afford numerous explanations as to how Mr. Colyar could be querying the carrier as to enforcement of the award and, subsequently, securing appellant's authorization to permit him to present same to the carrier, and still not communicate to appellant or his counsel the contractual documentation in support of the claim.

Instead of giving to appellant the benefit of doubt on this score, the court chose to infer that appellant either knew, or in the exercise of reasonable diligence could have known of the existence of the correspondence establishing the three-physician system. It did this despite the evidence that for many years prior to March 29, 1960, when appellant finally sought the assistance of the BLE in asserting his claim, Mr. Colyar was a BLE official representing engineer employees who adhered to the BLE and appellant was an official of a rival union, BLF&E, representing engineer employees who adhered to that organization. We respectfully suggest that this indicates that the district court did not exercise discretion in rejecting appellant's explanation but, instead, permitted its understandable reluctance to render idle the effort which had been expended in making its decision on summary judgment to stay the exercise of such discretion.

The second ground of the court's denial of appellant's Rule 60 (b) motion was that appellant had not produced and would not be able to produce at trial any evidence which could lead to a determination in his favor. The court's prediction that appellant would not be able to produce at trial any evidence which could lead to a determination in his favor should not be construed as an assertion of omnipotence on the part of the court; it emphasizes, instead, the somewhat dogged resistance of the court to the notion that there could be evidence of the applicable agreement other than the contents of the green booklet.

The Rule 60 (b) motion was directed at a summary judgment which, of course, should not have been granted unless the record left no doubt as to the absence of factual issues for trial. We submit that the newly discovered evidence should have been considered by the district court in terms of whether it created doubt as to the propriety of the summary judgment; not as to whether it changed the court's mind as to what the agreement of the parties was with respect to the right of the company to determine the physical qualifications of its employees for active service. The court's reliance upon the omission of any three physician panel provision from the revised booklet of January 1, 1956 evidences that, in passing upon appellant's Rule 60 (b) motion, the court was weighing the evidence, not determining whether the newly discovered evidence created doubt as to whether there were factual issues for trial. Obviously, the omission of the three physician panel provision from the 1958 booklet does not eliminate all possibility of the existence of such a provision as a term of the applicable agreement as of December 30, 1954. Upon trial appellant may be able to produce an explanation for the omission of the provision from the 1958 booklet. Appellant has been too busy fighting for survival against defendant's motions for summary judgment to proceed in the usual fashion to discover by deposition, and otherwise, all available evidence as to the terms of the applicable agreement as of December 30, 1954.

CONCLUSION

A combination of tenacious refusal by the carrier to observe the mandate of the National Railroad Adjustment Board and resistance by the court to the notion that there are sound reasons, including the necessity for full development, at trial, of the respective contractual rights and duties of the parties, why determination of appellant's case should not be made on motion for summary judgment, has effectively frustrated appellant's right to have his case heard on its merits. We respectfully submit that the grant of summary judgment in this case was error, just as we are now told by the Fifth Circuit that the grant of summary judgment in action 2080-SD-W was error. The district court also erred in refusing to exercise its discretion to correct matters by granting appellant's motion under Rule 60 (b).

For the reasons stated above, we respectfully request that the summary judgment be reversed and the cause remanded for trial on the merits.

Dated, January 24, 1964.

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By Charles W. Decker,
Attorneys for Appellant.

Certificate of Counsel

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Charles W. Decker,
Attorney for Appellant.

No. 18,724

In the

United States Court of Appeals

For the Ninth Circuit

F. J. GUNTHER,
Appellant,

vs.

SAN DIEGO & ARIZONA EASTERN RAILWAY COMPANY, a corporation
Appellee.

Brief for Appellee

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SUBJECT INDEX

TABLE OF AUTHORITIES CITED

STATUTES Pages

MISCELLANEOUS

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STATEMENT OF THE CASE

The petition in this cause was filed pursuant to section 3 First (p) of the Railway Labor Act (45 U.S.C. 153 First (p)). This section provides that if a carrier does not comply with an order of a division of the National Railroad Adjustment Board (hereinafter referred to as Adjustment Board) within the time limit in such order, any person for whose benefit such order was made may file a petition setting forth briefly the causes for which he claims relief and the order of the division of the Adjustment Board in the premises. The division here involved is the First Division. Its Award and Order No. 17646 in Docket No. 33531 are both dated October 2, 1956. The interpretation and order in the same case bear the same numbers and are dated October 8, 1958.

On March 22, 1957, appellant (hereinafter referred to as petitioner) filed his petition in the District Court to enforce the above award, alleging that appellee (hereinafter referred to as carrier) had breached the collective bargaining agreement between carrier and the Brotherhood of Locomotive Engineers (hereinafter referred to as Engineers) which agreement applied to the employment of petitioner as a locomotive engineer. For many years petitioner had been employed by carrier in this capacity. During said period of time the Engineers' agreement contained articles 35, 38 and 47 which confirm the fact that engineer employees have seniority rights, but which articles do not deal with physical examinations or standard physical fitness requirements for the operation of carrier's trains by locomotive engineers. At no time material to this proceeding did these articles or any portion of the Engineers' agreement provide for a panel of three physicians to review the decision of the carrier's Chief Surgeon. Nothing was produced by petitioner to suggest the existence of such a three-doctor panel provision prior to the final judgments rendered by the District Court in favor of carrier on April 8, 1959 (in Civil No. 2080-SD-W) and October 27, 1961 (in Civil No. 2459-SD-W).

It appears in this record without challenge (R. 71) that locomotive engineers have always been required to pass periodic physical examinations to remain in service and that the required period applicable to engineers seventy years of age and over is every three months (quarterly). Petitioner passed such physical examinations within this requirement from November 24, 1953, through December 15, 1954, at which latter examination it was found that his heart was in such condition that he would be likely to suffer an acute coronary episode. Based upon this conclusion, petitioner was physically disqualified from active service

on December 30, 1954, and was advised to take his pension.

Thereafter, petitioner presented his grievance to the Adjustment Board, as mentioned above, and, on October 2, 1956, that tribunal declared:

> "It is true that Carrier has the right and responsibility of determining within proper limits the physical fitness of employes to remain in service. It is true also that the employe has the right to priority in service according to his seniority and pursuant to the agreement so long as he is physically qualified. Where these two rights come into collision it has consistently been held by this Division that it has jurisdiction to determine whether the employe has wrongfully been deprived of service."

A three-doctor panel was ordered without reference to any supporting agreement provision. The panel made its findings, which the carrier, and ultimately the District Court, interpreted as supporting the carrier's Chief Surgeon. Petitioner sought enforcement of the award and order based upon the findings of the three-doctor panel by petition to the District Court dated March 22, 1957. In that enforcement proceeding the court on April 15, 1958, issued its Memorandum Opinion and Order (161 F. Supp. 295) which stated on page 298:

> "We find that the complaint states no facts showing that any award or order has been made by the Adjustment Board with which the carrier has not complied.
>
> "We shall hold this cause on our calendar until July 14, 1958, at which time, in the absence of any cause to the contrary shown, the carrier may present to the Court findings, conclusions and judgment in accord with this memorandum. De Priest v. Pennsylvania R. Co., D.C., 145 F.Supp. 596, 600.
>
> "This cause is continued to July 14, 1948 at 10 A.M. for further proceedings."

On July 14, 1958, the court granted petitioner's motion for a stay of proceedings to March 6, 1959. This stay was granted to petitioner pursuant to his statement to the court that he had filed a petition before the Adjustment Board for an interpretation of its award and order or for the issuance of a supplemental award determinative of his right to reinstatement in active service with the carrier (R. 105). The District Court pointed out:

> "The Board (Adjustment Board) did render an award and order on October 8, 1958, but this second award was not presented to this Court in the case then before it, Case No. 2080." (R. 105-106)

Thereafter, the carrier presented a motion to the District Court for leave to file a counterclaim to bring the alleged interpretation and order of October 8, 1958, into Case No. 2080-SD-W, and set the motion for hearing on February 16, 1959 (R. 22). On January 3, 1959, petitioner filed his opposing brief, stating in part as follows:

> "The proposed counterclaim is premature. The Interpretation Award and Order issued by the National Railroad Adjustment Board on October 8, 1958, has not, as yet, been presented to this Court by petitioner for enforcement . . . ." (p. 1)
>
> "Petitioner's request for enforcement of said Interpretation Award and Order will be made either in the form of a supplemental petition in this action or by the filing of a new petition. *It will be done prior to February 16, 1959.*" (Emphasis supplied.) (p. 2) (R. 22-23).

Notwithstanding the foregoing, petitioner, on February 7, 1959, filed a motion for dismissal without prejudice and simultaneously served a proposed order to be signed by the court entitled "Dismissal for Want of Jurisdiction". On

February 9, 1959, the court denied the carrier's motion to file a counterclaim. On March 6, 1959, the transcript of proceedings of the hearing before the District Court on petitioner's motion to dismiss for lack of jurisdiction and carrier's motion for summary judgment contains the following at page 13 (lines 13-19):

> "MR. DECKER: . . . I want to make sure your Honor understands that with respect to the motion for summary judgment I am concerned lest the granting of such motion be construed at a future date as being res adjudicata with respect to the interpretive (sic) award which has never been pleaded before this Court . . . ." (R. 24)

On April 8, 1959, the District Court rendered summary judgment in favor of carrier and against petitioner in Case No. 2080-SD-W.

Approximately a year and a half later, on September 26, 1960, petitioner filed the petition in the instant case (No. 2459-SD-W) (R. 2-12).

On November 28, 1960, the carrier filed a Motion for Summary Judgment on the grounds of (1) res judicata, (2) statute of limitations, and (3) excess of the Board's jurisdiction in that the latter was creating an arbitration medical panel when no such right was established in the contract between the parties. In its memorandum opinion of March 27, 1961, the District Court denied the carrier's motion without prejudice as to ground (3) above (R. 45-55). After answering, the carrier filed a second Motion for Summary Judgment on May 16, 1961 (R. 84-98), asserting that the Adjustment Board had no authority to create contractual provisions under the guise of interpretation, citing *Southern Pac. Co. v. Joint Council Dining Car Employees,* 165 F. 2d 26, where the Ninth Circuit said in footnote 2:

> "Section 3, subd. First, subsection (i), limits the jurisdiction of the Adjustment Board to disputes over the interpretation and application of contracts between carriers and their employees."

Petitioner's affidavit in opposition to this motion, dated May 29, 1961, is set forth at R. 99-101. On September 27, 1961, the court granted the carrier's Motion for Summary Judgment and issued its Opinion of that date (R. 104-59).

Petitioner appealed from said judgment to this court on November 27, 1961. While the appeal was pending and on June 5, 1962, petitioner moved for relief from operation of the judgment pursuant to Rule 60(b) F.R.C.P. and the District Court indicated its intention to entertain the motion. In presenting his motion, petitioner declined the court's invitation to specify any oral evidence and relied upon the affidavits of Mr. Colyar, General Chairman of Engineers, Mr. Decker, his attorney, and himself, in addition to the prior record in this case. The evidence thus offered to alter or change the District Court's judgment was the contention that the Engineers' agreement was amended in 1944-1945 by certain correspondence actually creating a three-doctor panel. No such correspondence was referred to by petitioner during the seven-year period of litigation prior to final judgment herein. Although the same counsel have represented petitioner throughout the entire period, they argue that carrier's attorneys in effect misled them by declaring that there was no provision in the agreement establishing a three-doctor panel and that they first discovered the correspondence showing the contrary to be true on February 28, 1962 (R. 225), while this case was on appeal in this court.

The carrier took the position that this correspondence could not qualify as "newly discovered" evidence because:

(1) it was a matter of record in the files of both the carrier and the Engineers' organization (both the unit representing Southern Pacific employees under their agreement and the unit representing carrier's employees under its agreement) for at least 17 years; (2) even if there were union rivalry which somehow interfered with the inspection of this evidence by amicable request, both the Engineers and carrier could have been subjected to discovery proceedings during the seven-year period of this litigation, but petitioner did not elect to use this procedure; (3) in any event, on March 28, 1960, General Chairman Colyar of the Engineers Brotherhood (representing the craft of locomotive engineers of carrier at all material times) and the Engineers Brotherhood were authorized to represent petitioner in handling to a conclusion the subject matter of this case (R. 255), and Mr. J. P. Colyar, in whose file the evidence was located, wrote to carrier asserting this claim on behalf of petitioner on March 29, 1960 (R. 254), which date was approximately six months prior to the filing of the within petition in the District Court (filed September 26, 1960, served on carrier in November of 1960); (4) Mr. Gunther, the petitioner, was General Chairman of the Brotherhood of Locomotive Firemen and Enginemen (Firemen), whose union membership includes a number of locomotive engineers employed by carrier, and Mr. Gunther regularly processed claims against carrier based upon the latter's alleged violation of their rights under the Engineers' agreement (R. 225-226) and as such representative on behalf of himself and others, enforcing agreement rights, as described by his attorney, it is difficult to see how he could have overlooked any agreement provisions limiting the right of carrier's physicians to determine the physical qualifications of locomotive engineers when the unchallenged

rules of carrier require regular periodic examination of all such employees (R. 71); and (5) the Engineers' agreement applicable to petitioner at the time of his disqualification contained no provision for a three-doctor panel (R. 241) and in the reprinted agreement of January 1, 1956, (orange cover) there was no reference whatever to such a panel (R. 315, lines 1-4). The District Court denied the motion for relief from judgment on March 29, 1963, declaring (R. 314):

> "We find nothing in the affidavits filed by petitioner or the exhibits attached to such affidavit, nor in any material presented by petitioner, to show that a three-physician panel to resolve disputes regarding an engineer's physical disqualification for active service was ever applicable, prior to 1959, to engineers on the SD&AE Railroad."

REPLY TO SPECIFICATION OF ERRORS

1. The District Court properly granted summary judgment for the carrier because the pleadings and affidavits disclose that: (A) No genuine issue of fact remains for trial; (B) carrier's right to have its Chief Surgeon determine physical qualifications of locomotive engineers was not subject to any review by a three-doctor panel at any material time and until 1959; (C) petitioner did not contend that a three-doctor panel was in the Engineers' agreement from the date of his disqualification in 1954 until final judgment in 1961 and the Adjustment Board likewise made no reference to any such provision; (D) there is no claim herein of fraud or bad faith on the part of carrier, its Chief Surgeon or examining physicians; (E) the rules of carrier requiring locomotive engineers attaining seventy years of age and over to pass quarterly physical examinations, their applicability to petitioner, and petitioner's disquali-

fication as a result of his sixth successive examination are unchallenged.

2. The District Court properly granted summary judgment for the carrier because this case involves an unwarranted assumption of jurisdiction by the Adjustment Board in creating a three-doctor panel provision in the agreement. The Railway Labor Act limits the Board's jurisdiction to interpretation or application of such agreement. This case is therefore suited to disposition by summary judgment proceeding.

3. The District Court properly granted summary judgment for the carrier because the action of the Adjustment Board was beyond its jurisdiction. No implied finding of agreement violation can be contended for in the Board's decision.

4. The District Court properly denied appellant's motion for relief under Rule 60(b) of the Federal Rules of Civil Procedure because (a) the evidence was not newly discovered, and (b) the proceedings on said motion established that there was no three-doctor panel provision applicable to the petitioner's situation. Petitioner's latest contention is persuasive that the District Court was correct in finding that articles 35, 38 and 47 do not constitute any limitation on carrier's right to determine the physical qualifications of locomotive engineers.

ARGUMENT

I. Resume of Facts.

In conformity with the long-standing, unchallenged rules of carrier, petitioner submitted himself for physical examinations by the carrier's physicians every three months. Such quarterly examinations have historically and uniformly been required of employees such as petitioner who are past the age of seventy and propose to operate loco-

motive engines on trains. On December 31, 1954, petitioner was advised that he could not qualify for this responsibility because the physicians had detected a heart defect in his last quarterly physical examination. This was confirmed upon review by the Chief Surgeon. He was advised that because he was a candidate for a coronary episode he should consider accepting his pension. Petitioner obtained another doctor's opinion which he contends is at variance with that of the Chief Surgeon and progressed to the Adjustment Board his claim for a three-doctor panel review of the doctors' opinions and for reinstatement to active service. Although petitioner was a representative of many locomotive engineers in handling their agreement disputes with this carrier, he did not point to any provision in the collective bargaining agreement to support his claim with the carrier or before the Board. The Adjustment Board likewise cited no agreement provision but instead said ". . . it has not been unusual . . . for the Division to provide for a neutral board of three qualified physicians . . ." (R. 8). Thereafter petitioner obtained an award and order asserting that the carrier's Chief Surgeon was in error and he should be reinstated to active service with pay for all time lost since October 15, 1955. The carrier filed this Motion for Summary Judgment asserting that the Board exceeded its jurisdiction in creating a three-doctor panel without agreement support and in its award and order against the carrier.

The Court below deemed the entire agreement to be contained in the orange booklet of January 1, 1956 (R. 315). Petitioner does not challenge carrier's affidavit to this effect. The court likewise found no ambiguity in the green booklet of November 30, 1938, and interpreted the same as placing no restriction upon the carrier's right to physically

examine its locomotive engineers without submitting to review by panels of non-railroad doctors which may reach conclusions at variance with the opinion of the Chief Surgeon whose good faith is not challenged.

II. The Judgment Appealed from Is Correct and Is Fully Supported by the Uncontradicted Material Facts in the Carrier's Affidavits. The Supreme Court Cases in Point Show That Policy Considerations Do Not Militate Against the Summary Judgment Herein.

A. THE APPLICABLE RULES OF LAW.

1. The Summary Judgment procedure prescribed in Rule 56 F.R.C.P. is intended to dispose of actions in which there is no genuine issue as to any material fact even though an issue may be raised formally by the pleadings.* *Koepke*

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*Petitioner cites *Trowler v. Phillips,* 260 F.2d 924 (9th Cir. 1958), presumably as authority that in a case where the findings of fact and conclusions of law are unnecessary they indicate that a summary judgment should not have been granted. This was true in the *Trowler* case, where it was contended that plaintiff's copyrighted maps of Antelope Valley and Hesperia were published without his leave. The summary judgment was granted despite the necessity of examining the source material to see if the end product met the standards of copyrightability (*Trowler* case, page 926). Also the affidavit simply stated that "similar methods were followed" in the Antelope Valley maps when "too many of the facts alleged with respect to Hesperia were peculiar to Hesperia." (*Id.* at 926). *A R Inc. v. Electro-Voice, Inc.,* 311 F.2d 508, (7th Cir. 1962) is a situation where the issue presented by motion for summary judgment was whether plaintiff's patent was valid over the prior art which was documentary in form. The court did not find anything in plaintiff's deposition testimony, accepted as that of an expert in the field, "*which precipitates a genuine factual issue material to the resolution of the ultimate issue presented by defendant's motion.*" (page 511, emphasis supplied.) This is precisely like the instant case where the contract contains no limitation, the carrier's affidavits assert that none exist, the court and the carrier's memoranda respectively challenge petitioner to cite any limitation, and petitioner fails to point to any admissible evidence of the existence of a limitation over a period of several years.

Furthermore, the *A R Inc.* case distinguishes the *Trowler* case, *supra,* declaring that even though no genuine issue of fact exists,

v. Fontecchio, 177 F.2d 125, 127 (9th Cir. 1949); *Surkin v. Charteris,* 197 F.2d 77, 79 (5th Cir. 1952). The sufficiency of the allegations in the complaint do not determine the Motion for Summary Judgment. "The cases construing Rule 56 FRCP 'clearly indicate to the contrary and if this were not the case, Rule 56 would be a nullity for it would merely duplicate the motion to dismiss.'" *Lindsey v. Leavy,* 149 F.2d 899, 902 (9th Cir. 1945); *Duarte v. Bank of Hawaii,* 287 F.2d 51 (9th Cir. 1961).

In the *Surkin* case, supra, the court declared at page 79:

> "The sufficiency of the complaint does not control and, although the burden is on the moving party to demonstrate clearly that there is no genuine issue of fact, the opposing party must sufficiently disclose what the

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specific findings might carry an "unwarranted implication that a fact question was presented." (page 513.) The court affirmed the summary judgment, noting that the District Court's order was cast in a form which set forth the reasons why "the Villchur patent lacked novelty and invention over the Olson patent."

The Court of Appeals for the Ninth Circuit in *Lindsey v. Leavy,* 149 F.2d 899 (1945), applied the correct rule in a criminal conspiracy case where appellees had filed motions for summary judgment and "supported these motions by extensive affidavits setting forth their connection and relationship with all matters pertaining to appellant and his claims in the instant case." (page 901.)

> ". . . In response to this record, appellant did not adduce facts which contradicted the essential and vitally material facts appearing in appellees' affidavits and exhibits." (page 901.)

On appeal, appellant complained of the absence of findings of fact and conclusions of law. This court said at page 902:

> ". . . Since a summary judgment presupposes that there are no triable issues of fact, findings of fact and conclusions of law are not required in rendering judgment, *although the court may make such findings with or without request.* Failure to make and enter findings and conclusions is not error. Moore's Federal Practice, 1944 Supp. to Vol. 3, p. 116 and cases cited." (Emphasis added.)

In accord, see: *Page v. Work,* 290 F.2d 323, 328-329, 334 (9th Cir. 1961), *cert. den.* 368 U.S. 875; *Christianson v. Gaines,* 174 F. 2d 534, 536 (D.C. 1949).

evidence will be to show that there is a genuine issue of fact to be tried."

The carrier in the instant case has demonstrated by affidavits that there is no genuine issue as to the fact that the agreement contained no provision for a three-doctor panel review or for any other review of the Chief Surgeon's decision as to the physical qualifications of locomotive engineers. The agreement itself, the testimony of labor relations officers of the carrier, the demand for the first three-doctor panel by the union some five years later, the first such agreement in 1959 and the findings of the National Railroad Adjustment Board in Award 17646 and its "Interpretation" all conclusively show that the agreement contains no such limitation. The foregoing evidence establishes this material fact with clarity. The moving party has demonstrated that there is no genuine issue of fact.

In these circumstances it is incumbent upon the opposing party to disclose what the evidence will be to establish a genuine issue of fact. He may not hold back his evidence until trial. *Engl v. Aetna Life Ins. Co.* 139 F.2d 469 (2nd Cir. 1943); *Surkin v. Charteris, supra; Gifford v. Travelers Protective Assn.,* 153 F.2d 209 (9th Cir. 1946); *Orvis v. Brickman*, 196 F.2d 762 (D.C. 1952).

> "And although the moving party be unaided by any presumption, when he has clearly established certain facts the particular circumstances of the case may cast a duty to go forward with controverting facts upon the opposing party, so that his failure to discharge this duty will entitle the Movant to Summary Judgment." 6 Moore's Federal Practice (2d Ed.) 2130.

At page 2131 this authority states:

> "To defeat a movant who has otherwise sustained his burden within the principles enunciated above, the

> party opposing the motion must present the facts in proper form—conclusions of law will not suffice; . . ."

Petitioner in the case at bar has failed to meet these requirements.

First it is clear that defendant carrier has submitted with its affidavits the entire collective bargaining agreement (R.70). It was the complete agreement in all respects as reprinted with orange cover on January 1, 1956 (R.315). This agreement is unambiguous (R.124); hence the parol evidence rule bars the introduction of oral evidence to modify, add to or subtract from it. 6 Moore's Federal Practice (2d Ed.) 2235. And at page 2236 the following appears:

> "Where, then, after applying the parol evidence rule there remains no genuine issue of material fact, summary judgment should be rendered for the party entitled to judgment under applicable substantive law principles."

The second reason why petitioner's position in opposition to carrier's motion is inadequate is that he fails to point to or cite any provision in the agreement for medical arbitration. The three-doctor panel is simply an arbitration board to resolve conflicting medical opinions. There is no statute establishing such a panel and petitioner has not pointed to any such legislation. Thus the only way an arbitration panel can be imposed upon the carrier is by a provision in the collective bargaining agreement.

Petitioner completely failed to point to any such agreement provision from the inception of his first case in 1957 until the final summary judgment herein on October 27, 1961. In an effort to create an issue of lesser dimension, petitioner cited three sections of the applicable agreement

and contended that they constituted a limitation upon the carrier's right to remove petitioner from service as a locomotive engineer upon the medical opinion of its doctors. These three sections are:

Article 35—Seniority, Article 47—Investigations and Article 38—Reduction of Force (R.100). None of these sections in any way refers to physically incapacitated locomotive engineers. It is the function of the court to interpret agreement provisions. *Hamilton v. Liverpool etc. Insurance Co.*, 136 U.S. 242, (1889). Interpretation cannot be used as a vehicle for adding agreement provisions. The Adjustment Board erroneously attempted this. It is interesting to note that the Board pointed to no agreement provision whatever as a basis for its enforced medical arbitration or as a basis for any limitation whatever upon carrier's right to determine physical qualifications of these employees in good faith. Significantly the Board did not point to any of the three provisions now relied upon by petitioner to justify its award. *The Board indicates in its decision only that "it has not been unusual" for it to appoint an arbitration medical-panel. Such an invasion of the carrier's rights and responsibilities cannot be supported under the guise of "interpretation" or "application" of agreements**. It is important to note that the Adjustment Board award and findings were introduced into this case by petitioner in his verified petition. His own evidence negates his present contentions as to the basis for the Board's award.

Thirdly the inadequacy of petitioner's opposition to carrier's Motion for Summary Judgment is apparent from his failure to cite one instance where the carrier's disqualification of a locomotive engineer for physical reasons de-

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**Southern Pacific Co. v. Joint Council Dining Car Employees*, 165 F.2d 26 (9th Cir. 1947), *cert. den.* 333 U.S. 838.

termined by its doctors was challenged, nullified, appealed, modified or even mentioned. He cannot dissolve the affirmative showing made under oath by carrier by blandly stating that it was the custom and practice to observe articles 38, 35 and 47. This does not reach the issue of physical disqualification. It is therefore irrelevant. Nor did the Adjustment Board find that the carrier breached the agreement in any way or that there was any bad faith (R. 131-132). It simply undertook to order the parties to arbitrate without any supporting agreement provision.

It is not enough for one opposing a motion for summary judgment to come forward without countervailing evidence or at least a showing that some evidence will be introduced at the trial to dispute the facts contained in the affidavits of the moving party. *Wilkinson v. Powell*, 149 F.2d 335, 337 (5th Cir. 1945); *Gifford v. Travelers Protective Assn.*, 153 F.2d 209, 211 (9th Cir. 1946); *Port of Palm Beach District v. Goethals*, 104 F.2d 706 (5th Cir. 1939); *Radio City Music Hall v. United States*, 135 F.2d 715 (2nd Cir. 1943); 6 Moore's Federal Practice (2d Ed.) 2129; *Orvis v. Brickman* 196 F.2d 762 (D.C. 1952).

Petitioner's affidavit in opposition to the carrier's Motion for Summary Judgment (R.99-101) does not meet these requirements. The first page thereof (R.99) shows Mr. Gunther's thorough familiarity with the agreement and "its interpretation and application by the parties thereto in the operations of defendant." The second page (R. 100) then quotes articles 35, 47 and 38 of the agreement as the basis of petitioner's right to continued employment upon the principles of seniority, discharge only for good cause and reduction of force in the reverse order of seniority. But there is no mention in these rules of physical disqualification or inability to safely perform duties. Seniority (as

referred to in articles 35 and 38) provides for the relative eligibility of employees to perform available work.* These rules do not bear upon the question of illness or incapacity. A review of the Adjustment Board Award and "Interpretation" Number 17646 (R.148-151) will disclose that none of these rules were cited as barriers to the carrier's refusal in good faith to permit petitioner to operate a locomotive because of the doctor's opinion. Nor does petitioner in his affidavit contend that they provide such a limitation. Instead he claims that these rules are "vague, ambiguous and insufficiently certain to specify" the rights of employees and of the employer. On the last page of his affidavit, page 3 (R.101), petitioner states that the interpretation and application of the foregoing articles "were done by reference to a long history of custom and practice in the railroad industry." Thereafter in lines 8-20 of said page 3 (R.101), he simply repeats the wording of the three articles and asserts that the removal of petitioner from the assignment of his choice on December 30, 1954, violated his seniority rights because he was senior to the engineer who replaced him. Finally he asserts that it was never the custom and practice to retire an engineer against his will. This was the entire showing in opposition to carrier's motion.

Conceding all that petitioner asserts to be true, the carrier's affidavits and documents establish that summary judgment was properly granted by the District Court. There is no question in this case that the carrier acted in good faith (R.131-132). Mr. K.K. Schomp's supporting affidavit establishes without challenge (R.69-82):

1) That locomotive engineers have always been required to *take and pass* periodic physical examinations and re-

*Article 47—Investigation by its terms provides the means of dismissing employees from service for good cause.

examinations to determine their fitness to remain in service and this rule applies to locomotive engineers past age 70 on a quarterly basis (R.70; lines 22-28);

2) In accordance with this rule, Mr. Gunther, the petitioner, who was over 70, reported for such examinations each quarter until December 15, 1954, when examining physicians determined that his physical condition was such that he could not qualify to operate an engine (R.70-71);

3) These findings were reviewed by the Chief Surgeon who concurred in the conclusion that Mr. Gunther's heart was in such condition that he would be likely to suffer an "acute coronary episode." (R.71);

4) Until December 1, 1959, the collective bargaining agreement contained no provision for a three-doctor panel or any other review of the company's physicians, and their recommendations were final and binding (R.71, lines 27-32, R.72, lines 1-3).

Clearly the carrier has met its burden of showing specifically the facts upon which it relies to show that the agreement contained no review procedure in physical examination determinations; and that any imposition of a three-doctor arbitration panel by the Adjustment Board would be tantamount to writing such a provision into the agreement of the parties under the guise of "interpretation." Changes in collective bargaining agreements can only be initiated by the procedures set forth in section 6 of the Railway Labor Act (45 U.S.C. 156). In fact such a change was initiated by the union party to this agreement through the service of a "Section 6 Notice" under the latter section of the Act on August 28, 1959 (R.73). This resulted in an amendment to the very article 35 mentioned in petitioner's affidavit. This amendment dated November 3, 1959, is an exhibit to Mr. Schomp's affidavit in support of this motion (R.75-76).

It is equally apparent that petitioner has not contradicted any of the above material facts and has not presented any evidence to show that any genuine issue of fact exists. At a later point in this brief we will discuss petitioner's motion after judgment herein based upon Rule 60 (b) F.R.C.P. Suffice it to say at this point the affidavit of petitioner, discussed in detail above (R.99-101), demonstrates that he was engaged in enforcing the agreement on behalf of locomotive engineers, worked as an engineer himself and was thoroughly familiar with the interpretation and application of the agreement in the carrier's operations. Yet he did not challenge the carrier's affidavits or point to a single case supporting or making up any custom or practice affecting physical qualification or disqualification by the carrier's physicians.

Petitioner had extensive opportunity to present any facts which he deemed pertinent to the court in opposition to the carrier's motion. The court repeatedly suggested to both parties that they should present all such facts. The instant action was filed on September 26, 1960. On November 28, 1960, the carrier filed its Motion for Summary Judgment on several grounds with supporting affidavits. One of the affidavits attached as Exhibit "A" the agreement which was applicable to petitioner's contentions herein. Counsel for petitioner argued that the entire contract was not before the court and that the entire contract should be construed (R.53). On March 27, 1961, the court denied the carrier's Motion for Summary Judgment, without prejudice, and admonished petitioner in its Memorandum Opinion of that date to bring in the contract and its limitations (R.53). In the same opinion the court declared:

> "Counsel for the petitioner likewise hints that the contract is ambiguous and that a limitation upon the right which the defendant claims might be found in

> the contract in the light of parol evidence admitted as an aid in interpreting it. Counsel for the petitioner, however, has filed no affidavit to show what parol evidence he deems important, nor, for that matter has he pointed out in what particulars the contract may be ambiguous.
>
> Summary judgment is an extreme remedy and should be awarded only when the facts are quite clear. (Kennedy v. Bennett, 261 F2d 20, Traylor v. Black, etc., 189 F2d 213.) Any doubt as to whether the motion should be granted must be resolved against the movant. (Booth v. Barber Transp. Co. 256 F.2d 927.) The function of a summary judgment is to eliminate sham issues (Irving Trust Co. v. U.S. 221 F. 2d 303)."

Thereafter on May 16, 1961, the carrier filed a second motion for summary judgment based upon the ground that the Adjustment Board exceeded its jurisdiction by ordering a medical arbitration panel without any supporting agreement provision. The carrier's Memorandum of Points and Authorities challenged petitioner to come forward with any evidence he might wish to assert in opposition to its affidavits. Thus the memorandum stated at pages 2 and 3 (R.85-86):

> "It [the agreement] contains no provision whatever creating a three-doctor panel to review the decision of the Carrier's physicians with respect to the physical fitness of its locomotive engineers to operate engines and trains. Nor can petitioner cite any such provision or practice in any affidavit which he might file in opposition to this motion for summary judgment. In this respect we think that this case is clearly determinable upon the proposition that one who sues for breach of contract must point to a provision in the contract which the other party has violated or he cannot prevail. Summary judgment is the appropriate method for disposing of this case. *Gifford vs. Travelers Protective Assn.*, 153 F.2d 209 (9th Cir. 1946)."

Despite all of the foregoing, petitioner filed only the affidavit of May 29, 1961, which we have described in detail above. There was no genuine issue of material fact. The summary judgment procedure was properly invoked.

The petitioner's citation of *Poller v. Columbia Broadcasting Sys. Inc.* 368 U.S. 464 (1962), is not in point because the court found in a 5-to-4 decision that summary procedures are improper in complex antitrust litigation where motive and intent play leading roles. In the *Poller* case four justices dissented, saying in part at page 478:

> "Further, the Rule [Rule 56 FRCP] does not indicate that it is to be used any more 'sparingly' in antitrust litigation (ante, p. 473) than in other kinds of litigation, or that its employment in antitrust cases is subject to more stringent criteria than in others .... there is good reason for giving the summary judgment rule 'its full legitimate sweep in this field.'"

And at page 480:

> "Despite the ample opportunity afforded him by the availability of pretrial discovery procedures, petitioner, as will be shown, was able to produce no evidence to support his charges that a conspiracy narrow or far-reaching, had been hatched."

In *White Motor Co. v. United States* 372 U.S. 253 (1962), the court said:

> "Summary judgments have a place in the antitrust field, as elsewhere, though, as we warned in *Poller vs. Columbia Broadcasting System* 368 U.S. 464, 473, they are not appropriate where motive and intent play leading roles."

It is asserted on page 26 of his brief that even if appellant has failed to disclose a factual issue at the trial level he may raise one on appeal, citing 6 Moore's Federal Practice (2d

Ed.) 2365. But the same authority on the same page states:

> "But an appellant may not, as a general rule, overturn a summary judgment by raising in the appellate court an issue of fact that was not plainly disclosed as a genuine issue in the trial court" and ". . . the opposing party is not, however, entitled to hold back his evidence until trial . . ."

In light of the foregoing discussion it is clear that petitioner has had a period of years in which to disclose such an issue and his failure to do so shows that no such issue exists.

Also on page 26 petitioner states the proposition that summary judgment is improper if the contract is ambiguous and there is a factual issue as to its meaning. As we have shown above there is no factual issue as to meaning since there are no facts to show that a three-doctor panel arbitration of the Chief Surgeon's decision existed at any material time. The facts demonstrate that the contrary is true. Nor are articles 38, 47 and 35 ambiguous. Furthermore, they do not apply to physical disqualification.

The case of *Osborn v. Boeing Airplane Co.,* 309 F. 2d 99 (9th Cir. 1962), cited by petitioner for this proposition is not in point. That case involved a summary judgment where the pre-trial order stated that plaintiff employee had submitted an idea to his employer through the company's suggestion system on a form reserving to the company the right to finally determine entitlement to cash awards. The appellate court reversed the judgment, stating at page 103:

> "Where, as here, the *existence and terms* of a contract must be determined by drawing inferences of fact from all of the pertinent circumstances, and the possible inferences are conflicting, the choice is for the jury." (Emphasis supplied.)

The case also contained a dispute as to whether a quasi-contractual obligation was present. Petitioner also relies upon *International Union of Mine, Etc. v. American Zinc, L. & S. Co.,* 311 F. 2d 656 (9th Cir. 1963). That case is dissimilar to the instant case in that it involves a dispute over the meaning of the words "membership dues" in the check-off clause of an agreement. The Department of Justice, in enforcing Section 302 of the Labor Management Relations Act, 1947, construed the term "membership dues" to cover "assessments". The National Labor Relations Board had held both ways on different occasions. In light of this the words "membership dues" were held to be ambiguous and not self-evident on the basis of the record there presented.

On page 27 of his brief, petitioner argues that some authorities hold summary judgment improper "in cases involving constitutional or other large public issues." He cites *Kennedy v. Silas Mason Co.* 334 U.S. 249 (1948), as authority for this statement, but analysis of that opinion reveals that where the record is clear and there is no triable issue of fact summary judgment ought to be granted regardless of the complexity or importance of the issues. That this is the correct interpretation of the *Kennedy* opinion is confirmed by the court's decisions in three antitrust actions involving issues of great public importance.* In each of these cases the Supreme Court affirmed the granting of summary judgment because the record was adequate and presented no triable issue of fact.

It should be further observed that the existence of an important, difficult, or complicated question of law is not per se a bar to a summary judgment if there is no genuine issue of material fact.

**Associated Press v. United States,* 326 U.S. 1 (1945); *International Salt Co. v. United States,* 332 U.S. 392 (1947); *United States v. United States Gypsum Co.,* 340 U.S. 76 (1950).

B. THERE IS NO UNRESOLVED FACTUAL ISSUE IN THIS CASE, AND IN PARTICULAR THERE IS NO SUCH ISSUE WITH RESPECT TO THE SENIORITY RIGHTS OR CONTINUED ACTIVE EMPLOYMENT OF PETITIONER.

Summary judgment should be rendered even though an issue may be raised formally by the pleadings where supporting affidavits and the opposing affidavits, if any, show that there is no genuine issue of material fact. 6 Moore's Federal Practice (2d Ed.) 2069; *Lindsey v. Leavy* 149 F.2d 899, (9th Cir., 1945) cert. den. (1946) 326 U.S. 783; *Gifford v. Travelers Protective Ass'n.* 153 F. 2d 209 (9th Cir., 1946). Affidavits are to be made on personal knowledge, shall set forth such facts as are admissible in evidence and shall show the competence of the affiant (Rule 56 (e) F.R.C.P.). In compliance with the foregoing rule the carrier presented the following material facts under oath:

(1) On December 30, 1954 there was no provision in the collective bargaining agreement applicable to the employment of Mr. Gunther providing for a three-doctor panel or for a medical review of any nature with respect to the findings of company physicians and surgeons relating to the physical qualifications of locomotive engineers to perform service (R. 70, lines 15-21).

(2) In 1954 long-standing requirements of carrier provided that locomotive engineers of age 70 and over must pass physical examinations to determine their physical fitness to remain in service (R. 70, lines 22-25).

(3) Petitioner reported for such a physical examination on November 24, 1953, and thereafter on a quarterly basis until December 15, 1954, when examining physicians determined that he was no longer physically qualified to remain in service as a locomotive engineer because he was likely to suffer an acute coronary episode. Based upon this medical opinion the carrier physically disqualified him from active service on December 30, 1954 (R. 70).

(4) On August 23, 1959, the Engineers, speaking through General Chairman J. P. Colyar, recognized the absence of a three-doctor panel from the agreement by serving a demand upon carrier for such a provision on August 28, 1959, and it was negotiated into the agreement on December 1, 1959 (R. 72-74).

None of the foregoing material facts have been controverted anywhere in this case, whether by means of pleading or by affidavit. The unchallenged facts demonstrate that no provision for a three-doctor panel existed prior to 1959, and that petitioner was properly withheld from actively operating a locomotive.

On pages 28 through 30 of his brief, petitioner points to the allegations in his petition as creating a factual issue. He argues that he did not allege the agreement "to be a written agreement nor did he refer to any particular instrument." However, on June 1, 1962, in support of this contention for a three-doctor panel in 1954, Mr. Decker, petitioner's attorney, avowed that until 1962 he believed that the green-covered booklet dated March 1, 1935, contained all of the terms of the Engineers' agreement applicable to petitioner (R. 225, 228). His argument was that he erroneously relied upon and accepted various sworn declarations which became transparent to him no earlier than 1962. Thus petitioner relied upon an affidavit of Mr. W. D. Lamprecht, Vice President of carrier, *dated February 13, 1958,* which declared under oath that the agreement in December, 1954, was the green-colored booklet dated March 1, 1935, plus amendments, *the sum total of which are contained in the orange-colored booklet which contained the entire Engineers' agreement as of January 1, 1956* (R. 227). Petitioner also relied upon a similar affidavit of Mr. K. K. Schomp, Manager of Personnel of carrier *dated November 25, 1960* (R. 229-230),

and his later affidavit containing the same declarations *under date of May 11, 1961* (R. 232-233). He points also to the Memorandum of Points and Authorities filed on *May 11, 1961,* by carrier's attorneys pointing out the fact that until December 1, 1959, there was no provision whatever for a three-doctor panel in the controlling agreement (R. 233). In the latter document, the following appears:

> "... It is clear that there would have been no occasion for such an amendment (December 1, 1959, referred to above) if there had been a provision for such a review [of the decision of the carrier's Chief Surgeon upon physical examination] in the agreement. *It is significant to note that petitioner cannot challenge* this statement in an affidavit." (Emphasis and material in brackets added). (R. 233)

Petitioner now asserts that he was General Chairman of the Firemen who regularly represented locomotive engineers in their agreement disputes with carrier (R. 225); that he provided his attorney with the green-covered booklet dated March 1, 1935, advising that "it contained all the terms of employment by said railway company of its locomotive engineers in effect at the time he was removed from active service by defendant on December 30, 1954" (R. 226); that, as described above, all of carrier's officials and negotiators filing affidavits herein agreed that there were no other terms, and in particular was no provision for a review of the Chief Surgeon's decision by a three-doctor panel or by any other means whatever (R. 225-233); that he, himself, was mistaken and all of the carrier officials signing affidavits misled him with their incorrect and untrue assertions under oath (R. 234); that he did not find time to initiate discovery proceedings to discover the facts from the Engineers'

Union or the carrier during the period 1957 through 1961;* that although he designated and employed the General Chairman of Engineers, Mr. J. P. Colyar, to represent him in this very matter (R. 254-255) in the spring of 1960 and at least six months before filing this action on September 26, 1960, and eight months prior to serving the complaint upon carrier in November of 1960, he (petitioner) did not have reasonable access to the evidence which he discovered for the first time in 1962 (R. 225) when this cause was before this court; and that the "newly discovered" evidence (letters of 1944, 1945 and 1947) from and to Mr. Colyar's predecessor general chairman contained in the files of Engineers and carrier should belatedly establish a right of review of the Chief Surgeon's decision.

1. Neither the green booklet nor any amendment thereto provided for any three-doctor panel arbitration of the Chief Surgeon's decision. There is no uncertainty or ambiguity whatever in this case.

From page 31 through 36 of his brief petitioner argues that there is an ambiguity which requires the resort to extrinsic evidence because the green booklet† may have had a number of amendments between March 1, 1935, and December 30, 1954.

This contention is completely without foundation. Petitioner's own affidavit filed in support of his later position under Rule 60 (b) F.R.C.P. under date of June 5, 1962, contradicts the argument on this point (R. 222, lines 5-16):

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*On page 53 of his brief, petitioner states: "Appellant has been too busy fighting for survival against defendant's motions for summary judgment to proceed in the usual fashion by deposition, and otherwise, all available evidence as to the terms of the applicable agreement as of December 30, 1954."

†Green-covered printed collective bargaining agreement between the Brotherhood of Locomotive Engineers and the defendant carrier dated Mareh 1, 1935, introducted as Exhibit "A" to the affidavit of Mr. Sehomp in support of Carrier's Motion.

> "At all times prior to reading said affidavit of J. P. Colyar [filed on June 5, 1962, R 187-219] it was my understanding that the SD&AE-BofLE agreement *contained no specific provision for determining disputes as to physical fitness of locomotive engineers to continue in service by resort to a three-physician panel* until January 1, 1956, when a provision was included as the last two paragraphs of Article 35 of the orange-colored booklet, 'Agreement by and between the San Diego & Arizona Eastern Railway Company and its Locomotive Engineers represented by the Brotherhood of Locomotive Engineers effective January 1, 1956', which was attached to the affidavit of W. D. Lamprecht filed in Action No. 2080-SD-W on or about February 13, 1958." (Emphasis supplied)

This was the affirmative understanding of petitioner, the general chairman of the firemen's organization, who worked as an engineer and who was "actively engaged in enforcing the provisions *of the Agreement referred to in his petition herein*" (Mr. Gunther's affidavit filed May 29, 1961; R. 99-101; Emphasis supplied).

This was also the affirmative understanding of Mr. K. K. Schomp, Manager of Personnel of carrier, whose affidavit filed December 2, 1960, states in part (R. 39, lines 26-32; R. 40, lines 1-14).

"As I stated in the affidavit dated November 23, 1960, the employment of Mr. F. J. Gunther at all times material to the pending action was subject to the collective bargaining agreement between the San Diego & Arizona Eastern Railway Company and the Brotherhood of Locomotive Engineers, dated March 1, 1935, as amended. On December 30, 1954, the date on which Mr. Gunther was released from active service because of the doctor's report of his physical condition, the aforesaid collective bargaining agreement, in-

cluding amendments thereto, contained no provision whatever relating to a three-doctor panel which could review the medical findings of the defendant's doctors with respect to the physical condition and ability of its locomotive engineers to operate its trains.

Since December 30, 1954, there had been no such agreement or amendment until the agreement signed on November 3, 1959, to become effective December 1, 1959, a copy of which is attached as Exhibit A hereto, with the exception of amendment to Article 35, Section 3(c), of the applicable agreement, effective February 1, 1957, which had no application to the circumstances involved in the employment of Mr. Gunther, and which was predicated solely upon the prior institution of legal proceedings by an employee."

Substantially the same language appears in Mr. Schomp's affidavit filed May 16, 1961 (R. 70, lines 15-21; R. 71, lines 27 to end). There is no ambiguity or conjecture in the fact that all parties understood that no such limitation existed in the agreement. The Adjustment Board likewise pointed to none. Consequently the District Court was correct in its interpretation of the agreement. *Hamilton v. Liverpool etc. Insurance Co.,* 136 U.S. 242, *supra.*

2. In this proceeding the unchallenged facts show that the Adjustment Board exceeded its jurisdiction by writing a contract provision under the guise of interpretation. Petitioner's contention that findings in excess of jurisdiction have presumptive validity is a bootstraps argument.

Petitioner's argument on pages 36 to 43 of his brief goes beyond the purport of the first 35 pages in that he now disavows the necessity of an agreement provision to support an award of the Adjustment Board.

This new approach also conflicts with the declaration of this court in *Southern Pacific Co. v. Joint Council Dining Car Employees*, 165 F. 2d 26 (9th Cir. 1945) *Cert. den.* 333 U.S. 838. In footnote 2, the Court states:

> "Section 3, subd. First, Subsection (i), limits the jurisdiction of the Adjustment Board to disputes over the interpretation and application of contracts between carriers and their employees."

The court noted that the Board itself has interpreted its own powers the same way, and quoted the Board as saying:

> "From its inception this Board has consistently held that its functions are limited to interpreting and applying the rules agreed upon by the parties . . ."

In accord see: *Thomas v. New York & St. L. R.R.,* 185 F. 2d 614, 616 (6th Cir. 1950); *Munhollon v. Pennsylvania R. R.,* 180 F. Supp. 669, 673 (N. D. Ohio 1960). 45 U.S.C. 153 First (i).

The objective of this section of the petitioner's brief is to avoid the obvious defect in the Adjustment Board order that a three-doctor arbitration panel should establish petitioner's physical qualifications. Petitioner now argues that the real issue before the Board was whether he was discharged from service without good cause. A review of the provisions of article 47 will at once disclose that it deals with discharges of physically qualified employees for rule violations. In *Wilburn v. Missouri-Kansas-Texas R. Co. of Texas* 268 S.W. 2d 726 (Texas App.) the court considered the claim of a railroad employee that he was wrongfully discharged when he was disqualified upon examination by the company doctor. He demanded a three-doctor panel which was refused. No such panel was contained in the agreement at the time or at all until February, 1950. The court held that plaintiff had no cause of action for wrongful discharge under the agreement, saying at page 734:

> ". . . There is a wide difference between a discharge because of affirmative action and a disqualification on account of physical disability as expressed in the contract which has been plead by plaintiff."

The proper interpretation of the agreement establishes that Article 47—Investigations was never intended to apply to cases of physical disqualification. This section deals with guilt or innocence of an offense which has been allegedly committed by an employee. It requires an investigation hearing prior to discharge. No claim has ever been made by petitioner heretofore that he was discharged in violation of the limitation to which he now points—Article 47—Investigations on page 74 of the agreement. The Board made no mention of that section and no claim thereunder was presented to it. The record contains an amendment to Article 35—Seniority dated November 3, 1959 (R. 41) providing for a three-doctor arbitration panel in the circumstances present in this case. The Union demand for this amendment to Article 35—Seniority appears at R. 42-43. This situation and the non-applicability of any specific agreement provision on December 30, 1954, is avowed in the affidavit of Mr. Gunther dated June 5, 1962 (R. 222). The petitioner's failure to exhaust the contractual and administrative remedies in connection with a claim of wrongful discharge and failure to accord an investigation would not only indicate his understanding that article 47 does not apply but also would bar such a contention at this late date. *Barker v. Southern Pacific Co.,* 214 F. 2d 918 (9th Cir. 1954); *Breeland v. Southern Pacific Co.,* 231 F. 2d 576 (9th Cir. 1955); *Peoples v. Southern Pacific Co.,* 232 F. 2d 707 (9th Cir. 1956).

In each of these cases the Court of Appeals for the Ninth Circuit affirmed summary judgment in favor of the defendant railroad party to the collective bargaining agreement where it appeared that either the contractual or administrative remedies had not been pursued by plaintiff.

The issue of discharge or suspension from service for a violation of rules as contemplated by Article 47 was not in-

volved before the Adjustment Board. The issue before the Board was whether petitioner could obtain a review of the Chief Surgeon's decision by a three-doctor arbitration panel (R. 7):

> "Carrier contends that notwithstanding such statement or any disagreement there is no rule permitting the appointment of a neutral medical board *as here sought* and that the decision of the chief surgeon that claimant is not physically qualified for service is not subject to review." (Emphasis supplied.)

As we have reiterated herein, the unchallenged affidavits prove that no such contractual provision existed and the Board's findings (R. 7-12) point to none. The only justification given by the Board for its order is: "it has not been unusual . . . for the Division to provide for a neutral board of three qualified physicians . . ." (R. 8) The issue was not, as petitioner argues on page 37 of his brief, whether he was removed from active service for good cause. The Board was required to find a contractual right to medical arbitration as a predicate to ordering one. No such finding is made and no such provision in the agreement is cited.

If the Board is authorized to write agreements for arbitration and impose them upon the parties without their consent the section of the Railway Labor Act dealing with interpretation and minor disputes (45 U.S.C. 153 First (i)) will to that extent consume and supplant the section of that Act dealing with contract negotiations and major disputes (45 U.S.C. 156). *Elgin, Joliet & Eastern Ry. v. Burley,* 325 U.S. 711 (1945).

If Mr. J. P. Colyar and the Brotherhood of Locomotive Engineers really believed that the agreement provided for a three-doctor arbitration panel they would not have made such a demand upon the carrier on August 28, 1959 (R. 73-

74). This demand states that it is under section 6 of the Railway Labor Act (45 U.S.C. 156) and article 68 of the agreement covering engineers of the carrier (green booklet, p. 82). The demand is to *adopt* the three-doctor panel provision "as the second paragraph of section 1, article 35, of the S.D. & A.E. Engineers' Agreement" (R. 73). The first paragraph of Article 35—Seniority, section 1, reads (R. 152):

> "Rights of engineers shall be governed by seniority in service of the Company as engineers and seniority of the engineer as herein defined shall date from first service as engineer."

This same section 1 is the provision to which petitioner points as the restriction upon the carrier from effectively determining the physical qualifications of locomotive engineers through its doctors (R. 99-101). Attention is invited to the agreement effective December 1, 1959, amending section 1 of article 35 as a result of the above demand under section 6 (R. 75-76).

On page 37 petitioner argues that the Board was required to impose medical arbitration despite the agreement. If this were true there would be no rights left to either party since it could not object to arbitration on any subject. If the Adjustment Board is thus elevated to such a dictatorial position there would be no need for agreements. Negotiations could not be carried on between management and labor because neither would have any rights to concede. The case cited by petitioner, *Hodges v. Atlantic Coast Line R.R.*, 310 F.2d 438 (5th Cir. 1962) involves the review of a motion to dismiss a petition to enforce an award of the Adjustment Board pursuant to 45 U.S.C. 153 First (p). The Board had found that Mr. Hodges had obtained a judgment against the carrier on an FELA claim for permanent disability

based upon his claim and medical testimony, recovering therefor the sum of $22,000.00; that he was thereupon removed from service without any charges or investigation as required by the collective bargaining agreement; that he then appealed his "discharge" under the agreement relying upon a medical report which now stated that he "should be employable at any work he wants to do, the foot at the present time is not disabling to him in any way"; that the carrier refused to give him a physical examination; and that the carrier denied his request for a three-doctor panel to determine his physical condition. On page 441 the court explained:

> ". . . To determine physical capacity, the Board, in effect, ordered a medical *compulsory arbitration.*" (Emphasis supplied)

At the outset it is interesting to note that the Fifth Circuit on the one hand points out that the courts are overburdened and a prime concern should be in simplifying litigation and on the other hand avoids any decision on the legal aspects of the case and instead orders the establishment of a medical arbitration panel to determine physical fitness. The salient points in this decision are:

1) Physical fitness is not even an issue in light of *Scarano v. Central R. Co. of New Jersey,* 203 F.2d 510 (3rd Cir. 1953), where the court, speaking through Circuit Judge Hastie, dealt with a similar case where an employee had recovered $27,750.00 under the FELA for permanent loss of earning ability as a result of the negligence of the carrier. Shortly after his recovery the plaintiff called upon the carrier to reinstate him in his job, relying upon the agreement. Like Mr. Hodges, Mr. Scarano asserted physical ability to perform his duties despite his recent contrary representations which led to his recovery in the FELA case.

The carrier refused to reinstate Mr. Scarano or to examine him to determine his physical condition. The court affirmed judgment in favor of the carrier noting that the two above inconsistent positions are not to be tolerated; "And this is more than affront to judicial dignity. For intentional self-contradiction is being used as a means of obtaining unfair advantage in a forum provided for suitors seeking justice." (p. 513) At page 512 the court declared that plaintiff's physical condition at the time when he sought reinstatement could not be established: "We hold that in the circumstances of this case plaintiff was estopped from making such an assertion." In the *Hodges* case the carrier's argument on this basis (310 F.2d 441) was rejected without discussion in deference to the view of the Board that a determination of physical fitness is essential to the final disposition of the matter before it. As the court in *Hodges* was in possession of facts showing that physical fitness was thus immaterial, it was inconsistent to object to the duration and complication of the litigation and at the same time to order a three-doctor compulsory arbitration panel to determine a fact which could never be in issue.

2) The *Hodges* case involves a different question than does the *Gunther* case. Hodges was refused any physical examination at all on the theory that he was estopped. The Board was confronted with an alleged deprival of seniority rights without any basis or reason which it would recognize; therefore it ordered a physical examination. In *Gunther* the carrier accorded the employee a physical examination by its doctors in accordance with long-standing rules which Mr. Gunther observed (R. 71). No challenge is made to these significant facts.

3) In *Hodges* the court distinguishes the *Gunther* case on the basis that in the latter case the three-doctor panel

had issued its medical arbitration report, which enabled the enforcing court to "determine the validity of the award based in part on such report. Thus, this determination may include questions whether the underlying collective bargaining agreement either restricts the carrier in the discharge of employees for suspected physical unfitness or the means by which management decision is to be determined or tested. After many years of juridical travail, that was the end result in *Gunther v. San Diego & Arizona Eastern Ry., supra,* in the final decision. D. C., 198 F. Supp. 402."

In light of the foregoing it is clear that the *Hodges* case, *supra,* does not decide any issue pertinent to the instant case. The facts are readily distinguishable.* The court declares that the question of the carrier's right to examine employees physically is now ready for decision, as was the end result in the *Gunther* case. Furthermore the case is now pending in the District Court before Judge Morgan for further proceedings.

Most of petitioner's discussion on pages 37 and 38 deals with discharge for cause which we have shown is not involved and was not claimed before the Board or referred to by it. Petitioner has not contended that the carrier acted in bad faith and has presented no facts to support such a contention (R. 131, line 30, through R. 132, line 14). There is no basis in the record for the statement on page 38 that the Board found either that the carrier had acted arbitrarily, without good cause, in bad faith or in violation of the agreement.

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*No physical examination was accorded to Mr. Hodges by the carrier, but since the court considered his ability to work to be material the carrier had removed his name from the seniority roster improperly. In *Gunther* the physical examination was accorded in good faith as is established by the facts. Mr. Gunther's name also remains on the seniority roster.

From pages 39 through 48 petitioner argues that the District Court infringed upon the Adjustment Board's powers as an arbitrator. This entire contention misconceives the difference between the industries subject to the National Labor Relations Act (NLRA: 29 U.S.C. 141 et seq.) and those subject to the Railway Labor Act (RLA: 45 U.S.C. 151 et seq.).

The scheme of the NLRA is to provide for the enforcement of arbitration clauses in collective bargaining agreements by court proceedings under section 301 of the Labor Management Relations Act (LMRA: 29 U.S.C. 185). In these proceedings the Supreme Court has held that all doubts should be resolved in favor of the submission to arbitration in the first instance.* The Supreme Court in each case of the Trilogy points out that it is the arbitrator's construction of the contract that the parties bargained for. (See quotations and analysis of these cases by the District Court in R. 137-140.)

The scheme of the Railway Labor Act is quite different. As we have demonstrated herein, section 3 First (p) (45 U.S.C. 153 First (p)) of the Act provides that if a carrier does not comply with an order of the Board, a suit for enforcement, like the case at bar, may be brought within two years. "The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board."

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*Steelworkers Trilogy: *United Steelworkers vs. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers vs. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers vs. Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960).

In *Brotherhood, etc. v. Atlantic Coast Line R.R.,* 253 F.2d 753, 757-58, Chief Judge Parker of the Fourth Circuit, said:

> "If it had been intended, as appellant argues, that the orders of the Board rendered pursuant to 45 U.S.C.A. § 153 should have the effect of awards of arbitrators, some such provisions as are contained in 45 U.S.C.A. §§ 158 and 159 which relate to arbitration under 45 U.S.C.A. § 157, would have been provided for their enforcement. The fact that an entirely different provision was made for the enforcement of Board orders under section 153 from that made for enforcement of arbitration awards entered under the existing statute relating to arbitration is a matter which cannot be ignored and which shows clearly that Congress did not intend Board orders to have the effect of arbitration awards."

Petitioner notes that in *Brotherhood of Railroad Trainmen v. Chicago River & I. R.R.,* 353 U.S. 30 (1957), the court affirmed an injunction against a strike called for the purpose of obtaining concessions from the railroad in cases pending before the Adjustment Board. The court referred to the Board procedure as being a type of compulsory arbitration of pending cases. In *Brotherhood of Locomotive Engineers v. Louisville & N. R.R.,* 373 U.S. 33 (1963), the Supreme Court enjoined a strike called for the purpose of obtaining concessions from the railroad in cases which had been decided against them by the Adjustment Board on the theory that the court proceedings under section 3 First (p) et seq. of the Railway Labor Act are part of the compulsory settlement procedure which must be utilized instead of self-help.

In light of the foregoing the District Court properly observed the Railway Labor Act in this suit under section 3 First (p) when it refused to enforce an order which was demonstrably beyond the Board's jurisdiction.

3. Policy considerations do not favor a usurpation of jurisdiction by the Adjustment Board any more than they would favor such action by a court.

From page 44 through page 48 of his brief the petitioner argues that the provisions of the Railway Labor Act do not support the use of the summary judgment procedure in an enforcement suit under section 3 First (p) (45 U.S.C. 153 First (p)). In support of this view he cites *Kirby v. Pennsylvania R.R.*, 188 F.2d 793 (3rd Cir. 1951) and *Hodges v. Atlantic Coast Line R.R., supra,* which we have already discussed.

In the *Kirby* case the appellate court declared that an award of the Board which is vague may be made the basis of an enforcement proceeding. Under section 3 First (p) the district courts "are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the * * * Board." (Page 796)

The court continued on page 796 as follows:

> ". . . But it (Congress) has protected the party who lost before the Board from having unfair advantage taken of him by making the findings of the Board prima facie only. The loser must go forward with attacking proof; but the facts are not conclusively established by the findings."

The Court of Appeals in *Kirby* then considered another point upon which it reversed the lower court and at the same time demonstrated that the procedure in an enforcement suit is the same as in actions at law generally. This involved the question whether the proper employees were given notice. It was held that the carrier must raise such a question of fact affirmatively as distinguished from the motion to dismiss addressed solely to the pleadings as in *Kirby,* in order to overcome the presumption of validity of

the award. The court pointed out that on remand the District Court could determine what employees were entitled to notice and whether they received it. At page 800 the court concludes: "In the event that the defendant fails to meet the burden of upsetting the Board's award on this basis, the case may then proceed to a trial on the merits." It is also to be recalled that in *Hodges* the plaintiff had been deprived of his entire employment relationship without a physical examination on the basis of estoppel. There the court felt that there should be a physical examination in the record before determining the validity of the award which "may include questions whether the underlying collective bargaining agreement either restricts the carrier in the discharge of employees for suspected physical unfitness or the means by which management decision is to be determined or tested." 198 F. Supp. 402.

Neither *Kirby* nor *Hodges* supports petitioner's argument that "the capacity of the award to support this enforcement action is not dependent upon there being such a provision in the applicable agreement." (Petitioner's brief; pages 36-37) Instead they point out that the carrier's position and the decision below are correct.

In *Railroad Yardmasters v. Indiana Harbor Belt R.R.*, 166 F.2d 326 (7th Cir. 1948) the court affirmed the lower court's dismissal of an enforcement proceeding under section 3 First (p) of the Act on two grounds, one of which was that "there are no facts disclosed in these so-called findings upon which an award could be based." 166 F.2d 329. The claim was that two yardmen had been improperly granted seniority rights, thus depriving two regular yardmasters of their standing. At page 330 the court declared:

> "We are of the view that it cannot reasonably be held that the award and findings in the instant case

> are sufficiently definite and certain as to make a prima facie case in favor of the plaintiff. *Plaintiff necessarily cannot rely upon the findings and award but must offer additional proof in support of the allegations of its bill.*" (Emphasis supplied.)

Petitioner recognizes the fact that the *Railroad Yardmasters* case requires that the necessary material facts must be shown in the award if it is to be given any prima facie weight in an enforcement proceeding. Because it obviously emphasizes the lack of any agreement provision to support compulsory medical arbitration in the *Gunther* case, at bar, petitioner characterizes the former case as "unenlightened." *System Federation No. 59, etc. v. Louisiana & A. Ry.,* 119 F.2d 509 (5th Cir. 1941), and *Smith v. Louisville & N. R.R.,* 112 F. Supp. 388 (Ala. 1953) are in the same category according to footnote 38 on page 45 of his brief.

Commencing on page 46 petitioner's brief presents an argument to the effect that the statutory procedure in the Railway Labor Act unduly restricts employees; and therefore the Board Awards should be given special weight. But the fact is that the Act was passed in the public interest to avoid strikes over minor issues by providing a peaceful, mandatory and exclusive system for resolving grievance disputes. *Locomotive Engrs. v. Louisville & N. R.R.,* 373 U.S. 33 (1963). Petitioner does not point out the fact that the employer is restricted as well. In *Order of Conductors v. Southern Ry.,* 339 U.S. 255 (1950), the court held that a state court could not take jurisdiction over an employer's declaratory judgment action concerning an employee grievance subject to sec. 3 First because the other party would be deprived of his privilege under that section to refer the dispute to the Board. After an award is rendered in favor of an employee he may bring an enforcement action which

is to "proceed in all respects as other civil suits." As the court declared in *Nord v. Griffin,* 86 F.2d 481, 484 (7th Cir. 1936), with regard to section 3 First (p) of the Act:

> ". . . The clear intent was not to limit the previously existing jurisdiction of the court, but rather to extend that jurisdiction to cases to which it had not previously applied."

III. The District Court's Denial of Relief Under Rule 60 (b) Was Proper.

There was no abuse of discretion in the court's refusal to reopen the judgment some eight months after its entry. We shall set forth our reasons for this statement, but to avoid restating our detailed analysis herein the court's attention is invited to "Defendant's Memorandum in Opposition to Motion Pursuant to Rule 60 (b)" appearing in the record as R. 288-302. The District Court's opinion denying the motion appears at R. 306-318.

At pages 48 and 49 of petitioner's brief he describes the events which led up to the motion under Rule 60 (b) F.R.C.P. The record herein shows that in light of all of the facts none of the requirements of Rule 60(b) were satisfied; and even if they had been observed the "newly discovered evidence" did not establish any limitation upon the Chief Surgeon's decision by reason of which Mr. Gunther was disqualified from operating a locomotive.

We have shown herein that this action was filed in September of 1960 and petitioner was given numerous opportunities by the court to produce evidence of any limitation upon the finality of the Chief Surgeon's decision or of any three-doctor panel arbitration provision in the agreement. In denying the carrier's first motion for summary judgment on March 27, 1961, the court pointed out the

lack of any affidavit showing such a contractual limitation or evidence in aid of interpretation which would establish either a limitation or an ambiguity (R. 53-54). Nothing was added in his affidavit of May 29, 1961 (R. 99-101) opposing the carrier's second motion, except the fact that Mr. Gunther was thoroughly familiar with the agreement and "its interpretation and application by the parties thereto in the operations of defendant." The judgment was granted on September 27, 1961 (R. 104-154). No discovery proceedings were instituted by petitioner during this period or at any time during the case numbered Civil No. 2080-SD-W (161 F. Supp. 295).

A. EVEN IF THE PROFFERED EVIDENCE WERE OTHERWISE RELEVANT IT WAS IN THE POSSESSION OF PETITIONER'S REPRESENTATIVE THROUGHOUT THIS CASE. NO SHOWING OF DUE DILIGENCE OR EXCUSABLE NEGLECT CAN BE MADE.

Mr. Gunther represented engineers in their contract disputes with the carrier (R. 99). He was thoroughly familiar with said engineers' contract, (R. 99-101) and its interpretations in defendant carrier's operations (R. 99). Petitioner's present counsel has represented him continuously for more than four years (R. 313-314). Petitioner's excuse for non-discovery is inter-union rivalry between firemen and engineers (R. 221), but this rivalry did not interfere with his representation of engineers under the engineers' contract (R. 99). Nor does the said excuse obtain from and since March 28, 1960, when petitioner appointed General Chairman Colyar and the Brotherhood of Locomotive Engineers to handle his case to a conclusion, granting "full and complete authority" to prosecute or settle the same (R. 255). In pursuance of the authority Mr. Colyar wrote to the carrier on March 29, 1960 (R. 254). From this unchallenged evidence it appears that any evidence of letters written in

1945 or 1947 was in the files and possession of petitioner's authorized representative at least six months prior to the filing of this action on September 26, 1960 (R. 314). Furthermore, it is significant that despite all of the suggestions by the court over a period of years prior to the judgment the petitioner was not able to cite any instance where an engineer's physical disqualification by the doctors was reversed, challenged or appealed. In these circumstances, it would appear that the existence of a three-doctor arbitration panel provision applicable to him was at the least inherently improbable. In any event, this record does not contain the slightest justification for the reopening of the judgment herein under Rule 60 (b) F.R.C.P.

B. THE "NEWLY DISCOVERED EVIDENCE" DOES NOT SHOW THAT THERE WAS A THREE-DOCTOR ARBITRATION PANEL OR ANY OTHER LIMITATION ON THE DECISION OF THE CHIEF SURGEON APPLICABLE TO ENGINEERS ON THE SD&AE RAILROAD.

Even if the 1945-1947 letters had been introduced either prior to judgment herein or within the period during which a motion for a new trial could be made, it would not have established any limitation whatever upon the finality of the Chief Surgeon's decision disqualifying a locomotive engineer because of heart trouble.

Briefly, it is petitioner's asserted position in his affidavit that until June 5, 1962, "it was my understanding that the SD&AE-BofLE agreement contained no specific provision for determining disputes as to physical fitness of locomotive engineers to continue in service by resort to a three-physician panel until January 1, 1956 . . ." (R. 222, lines 6-9). The said affidavit of Mr. Colyar, General Chairman of the Brotherhood of Locomotive Engineers, purports to show that in 1944 the Engineers agreed with the carrier that interpretations of the separate and distinct engineers agree-

ment with Southern Pacific Company would be applied to similar provisions in the agreement between the Engineers and the (SD&AE) carrier in the instant case and that a letter of 1947 indicated such an interpretation on Southern Pacific.

The question to be resolved by the District Court was whether petitioner should be permitted to reopen the judgment which had been entered eight months ago in light of the following facts:

1) The Adjustment Board in Award 17646 (R. 7-8) and its Interpretation (R. 10-11) did not point to or rely upon the alleged rule or any agreement provision at all. Nor would the three-doctor panel which the Board ordered satisfy the requirements of the alleged 1947 letter. No specialist in the disease (heart) was ordered by the Board and it did *not* require a decision as to the engineer's ability to conform to *company prescribed standards* or even refer to such standards (R. 317). Mr. Colyar's proposed evidence would destroy petitioner's position by showing that the Adjustment Board's order was incorrect.

2) The proposed evidence of Mr. Colyar would be inconsistent with the petitioner's evidence herein that as of the date of reprinting, the engineers' agreement contained all amendments and constituted the entire agreement (R. 188, line 25, through R. 189, line 13). The District Court asked petitioner's counsel at the hearing why the provision for a three-doctor panel was not in the January 1, 1956, agreement if it had, as alleged, been negotiated between 1935 and 1956 to apply to engineers of defendant carrier (R. 315). No direct answer was given. In a later brief he replied that "A reasonable inference to be drawn for its omission" is

inadvertence (R. 315).* Mr. Gunther, who worked as an engineer, actively enforced the engineers' agreement for other locomotive engineers (R. 99) and is thoroughly familiar with its interpretation and application (R. 99), was never aware of any such agreement provision (R. 221).

3) The proposed evidence would be inconsistent with Mr. Colyar's Section 6 demand (45 U.S.C. 156) dated August 28, 1959, to adopt a three-doctor panel provision as section 1 of article 35 of the engineers' agreement (R. 214) and the subsequent agreement of the parties, in response to said demand, effective December 1, 1959 (R. 217-218).

The District Court properly concluded (R. 314):

> "We find nothing in the affidavits filed by petitioner or the exhibits attached to such affidavits, nor in any material presented by petitioner, to show that a three-physician panel to resolve disputes regarding an engineer's physical disqualification for active service was ever applicable, prior to 1959, to engineers on the SD&AE railroad."

IV. The Judgment in the Prior Action in the District Court Between the Same Parties on the Same Cause of Action Constitutes a Bar to This Action.

On March 22, 1957, petitioner filed his "Petition to Enforce Award and Order of National Railroad Adjustment Board" in the District Court against this defendant. The allegations of the 1957 petition in Civil No. 2080-SD-W

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*On January 26, 1955, General Chairman Colyar wrote to carrier "in acordance with Article 68" of his desire to reprint the agreement (R. 278-284), saying "In order to bring it up to date, the settlements and agreements set forth hereafter should be applied to the present rules or corrections made, whichever is applicable." Article 35 is shown as, "no change" (R. 282) despite counsel's explanation that the amendment to said article was omitted by "inadvertence."

(198 F. Supp. 40) are substantially the same as those in the instant petition. The instant petition was filed September 26, 1960, as Civil No. 2459-SD-W. Both the 1957 petition and the instant petition alleged the same breach of the collective bargaining agreement on December 30, 1954, as the basis of petitioner's claim for relief. On April 15, 1958, the District Court issued its Memorandum Opinion and Order which stated on page 5:

> "We find that the complaint states no facts showing that any award or order has been made by the Adjustment Board with which the carrier has not complied.
>
> "We shall hold this cause on our calendar until July 14, 1958, at which time, in the absence of any cause to the contrary shown, the carrier may present to the court findings, conclusions and judgment in accord with this memorandum (DePriest v. Pennsylvania Railroad Company, 145 F. Supp. 596, 600)."

Thereafter on June 28, 1958, petitioner forwarded to the First Division, NRAB, a document entitled "Ex Parte Submission" seeking an interpretation of Award 17646 which would be "so worded as to make his right to reinstatement absolute and unconditional, providing back pay to October 15, 1955 . . ." At the same time he filed with this court a "Notice of Motion and Motion for Stay of Proceedings", together with an affidavit signed by him, which concludes: "WHEREFORE affiant requests a stay of these proceedings pending determination upon said submission by said Board."

By minute order of July 24, 1958, the District Court granted petitioner's motion to stay proceedings until February 16, 1959, and at the same time continued carrier's motion for summary judgment to the same date.

Subsequently, on October 8, 1958, the First Division, NRAB, issued its Interpretation and Order which were

responsive to the "Ex Parte Submission" of petitioner described above.

Carrier thereafter presented a motion to this court for leave to file a counterclaim seeking injunctive relief against petitioner's threat to instigate a strike or other economic pressure to enforce the so-called Interpretation and Order of October 8, 1958, and to bring the same (R. 10-12) before this court with the prayer that it should be determined to be void for a number of reasons, including those which had already been enumerated in the case. The motion was set for hearing on February 16, 1959.

Petitioner filed his brief in opposition to carrier's motion under date of January 3, 1959, stating in part as follows:

> "The proposed counterclaim is premature. The Interpretation, Award and Order issued by the National Railroad Adjustment Board on October 8, 1958, has not, as yet, been presented to this court by petitioner for enforcement . . ." (page 1)
>
> "Petitioner's request for enforcement of said Interpretation, Award and Order will be made either in the form of a supplemental petition in this action or by the filing of a new petition. It will be done prior to February 16, 1959." (page 2)

Notwithstanding the foregoing, petitioner, on February 7, 1959, filed a motion for dismissal without prejudice under F.R.C.P. 41(a)(2). In his affidavit in support of the motion, petitioner's attorney attached a copy of the October 8, 1958, documents (R. 10-12). The gist of this motion was set forth on page 2 of petitioner's memorandum of February 7, 1959, viz:

> "This Court has, in effect, ruled the initial petition herein to be defective for failure to state a claim. Hence, petitioner must plead his now clearly established right to reinstatement by way of a new petition; not by way of a supplemental pleading in this action."

In conjunction with his motion petitioner served a proposed order to be signed by the court entitled "Dismissal for Want of Jurisdiction."

On February 9, 1959, the court issued an Order denying carrier's motion to file the counterclaim. At page 2 of this Order the court stated:

> "Petitioner has not filed with this Court any proceedings to enforce any further award against the defendant, nor has he brought to the Court's attention any further award or any interpretation of the award which was the subject of this action."

The Transcript of Proceedings dated March 6, 1959, of the hearing before the court on the petitioner's motion to dismiss for lack of jurisdiction and the carrier's motion for summary judgment shows that the former was denied and the latter was granted.

Notwithstanding all of the foregoing, petitioner did not, at any time prior to the entry of judgment, file with the court the so-called Interpretation and Order of October 8, 1958. On April 8, 1959, the District Court rendered summary judgment in favor of carrier and against petitioner which was not appealed.

The instant action was filed on September 26, 1960, in which petitioner seeks the same relief for the identical alleged breach of contract on December 30, 1954. Petitioner relies upon the professed "Interpretation" and "Order" of October 8, 1958, which he had obtained during the continuance granted to him for that purpose by the District Court and which he declined to incorporate in the prior proceeding in Award No. 17646, Docket 33531.

In the first suit on this cause of action, petitioner could have put into evidence the interpretation of the first order and award. Petitioner did not choose to do so. Instead peti-

tioner now seeks to introduce the interpretation for the first time in a second suit. The law is clear and well established that where a second action is based upon the same cause of action as that upon which the first was based, the judgment in the first action is conclusive as to all matters which were litigated or might have been litigated in the first action.

Restatement, Judgments § 48 (1942)
Developments in the Law—Res Judicata, 65 Harv. L. Rev. 818 (1948)
Angel v. Bullington, 330 U.S. 183 (1946)
Commissioner v. Sunnen, 333 U.S. 591 (1947)

In the leading case of *Angel v. Bullington,* 330 U.S. 183, 193 (1946) the court stated:

> ". . . Litigation is the means for vindicating rights, but it may also involve unwarranted friction and waste. The doctrine of *res judicata* reflects the refusal of law to tolerate needless litigation. Litigation is needless if, by fair process, a controversy has once gone through the courts to conclusion.

In *Commissioner v. Sunnen,* 333 U.S. 591, 597 (1947), the same court observed that res judicata is a doctrine of judicial origin, and said:

> ". . . The general rule of *res judicata* applies to repetitious suits involving the same cause of action. It rests upon consideration of economy in judicial time and public policy favoring the establishment of certainty in legal relations. The rule provides that when a court of competent jurisdiction has entered a final judgment on the merits of a cause of action, the parties to the suit and their privies are thereafter bound 'not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any

other admissible matter which might have been offered for that purpose.' "

In *King v. International Union of Operating Engineers,* 114 Cal. App. 2d 159, 250 P.2d 11 (1952), the court was confronted with the question of whether prior litigation in representative capacity by members of a union local against their international was res judicata because the prior decision involving the same cause of action was based on the failure of the members to exhaust their intra-union remedies. The appellate court held for the respondent union on the ground that the prior decision had in fact been on the merits and was thus res judicata in the present action.

In connection with the last point, it is revealing to note the language of Justice Frankfurter, speaking for the majority in *Angel v. Bullington, supra,* at page 187:

> "For purposes of *res judicata* the significance of what a court says it decides is controlled by the issues that were open for decision."

To demonstrate the propensity of the courts to apply the doctrine of res judicata where applicable, the attention of this court is directed to *Williamson v. Columbia Gas & Electric Corp.,* 186 F.2d 464 (1950). There the United States Court of Appeals for the Third Circuit, citing Restatement, Judgments § 43 (1942), held that an adjudication in favor of defendant in an antitrust action on the ground that the action was barred by the statute of limitations was res judicata as to another suit in the same cause of action *even though the action later begun was finished first.*

It is elementary that the rule of res judicata can be properly invoked by a Motion for Summary Judgment. *Curacao Trading Co. v. Federal Insurance Co.,* 3 F.R.D. 203 D.C. N.Y.); 6 *Moore's Federal Practice, 2d Ed.,* p. 2258. It fol-

lows that since the entry and finality of the prior judgment are not open to challenge, the competency of the court rendering said judgment is clear, and the essential issue and the parties concerned in said judgment are the same here as in the prior case, summary judgment for carrier, based on the rule of res judicata, is appropriate here.

V. As the October 8, 1958 Interpretation and Order Is the Same Cause of Action Presented in the Prior Action No. 2080-SD-W (198 F. Supp. 402) Its Presentation in the Instant Action Is Barred by the Statute of Limitations. The Delay in the Instant Action Likewise Supports the Defense of Laches.

We have heretofore demonstrated that the October 8, 1958, Interpretation and Order (R. 10-12) are simply an attempt by the First Division, NRAB, to improve upon the October 2, 1956, Award and Order (R. 7-9). Both relate to a claimed violation of the collective bargaining agreement on December 30, 1954. Having before it no new evidence other than the three-doctor panel reports, the Board's second action by way of "Interpretation" does not revitalize its prior final Award. (Exhibits A and B to the petition are based on the same cause of action (R. 7-12).)

Petitioner filed suit in the District Court on March 22, 1957, to enforce Award No. 17646, Docket 33531, and the Board's Order thereon.

Approximately one year and three months after he commenced this action, petitioner requested and was given a continuance of almost seven months in which to obtain an interpretation of this award. The transcript of hearing of July 14, 1958, on petitioner's motion for a continuance, shows that petitioner was not going into the whole subject anew, but that he was simply seeking to perfect the award. Petitioner's attorney advised the court that it would be necessary to arrange this continuance to avoid the doctrine of res judicata.

During the period of the more than six-month continuance, petitioner obtained an Interpretation by the First Division, Adjustment Board (R. 10-11). In fact, the Interpretation was issued less than three months after July 14th, viz., on October 8, 1958. Yet the statement of the case above shows that he failed and declined to bring it to the attention of the court. When he threatened strike action to force the defendant to yield, the latter moved the District Court to permit the filing of a counterclaim which, had it been allowed, would have brought the so-called Interpretation to the court's attention.

We have shown that petitioner's failure and refusal to amend his petition to include the Interpretation throughout the four-month period after its issuance has resulted in a judgment against him on the merits. As pointed out above, the doctrine of res judicata bars the new petition which has been filed more than a year and five months after the judgment was entered against him.

Likewise, the second claim on the same cause of action is barred by the two-year statute of limitations contained in Section 3 First (q) of the Railway Labor Act (45 U.S.C. 153 First (q)). This section states:

> "All actions at law based upon the provisions of this section shall be begun within two years from the time the cause of action accrues under the award of the division of the Adjustment Board, *and not after.*" (Emphasis ours.)

On October 2, 1956, the First Division, Adjustment Board, issued its final Order to carrier requiring it to comply on or before November 2, 1956 (R. 9). The purported Interpretation cannot be considered a second award in connection with the matter since it is not proper to render two awards in connection with the same subject matter (45

U.S.C. 153 First (m)). The provision for interpretations in the latter section does not affect the finality of the Award and Order of October 2, 1956. Consequently, petitioner had two years next after November 2, 1956, in which to file a petition under the Railway Labor Act. His failure to file such a petition within that period of time or to incorporate the Interpretation into the action which was pending before this court has resulted in the loss of his claim under the Railway Labor Act. *Joint Council, etc. v. Delaware, L. & W. R.R.*, 157 F.2d 417, 420 (2d Cir. 1946); *Railroad Yardmasters v. Indiana Harbor Belt R.R.*, 70 F. Supp. 914 (N.D. Ind. 1947), *aff'd* 166 F.2d 326 (7th Cir. 1948).

The Summary Judgment procedure may be used effectively in the area of affirmative defenses such as these. 6 Moore's Federal Practice, 2d Ed., 2262; *Gifford v. Travelers Protective Ass'n*, 153 F.2d 209 (9th Cir. 1946).

VI. A Purported Award of the National Railroad Adjustment Board Issued Without Jurisdiction Is Void and Unenforceable.

The jurisdiction of the National Railroad Adjustment Board is established by 45 U. S. Code, section 153, which reads in part as follows:

> "First. There is established a Board, to be known as the 'National Railroad Adjustment Board', the members of which shall be selected within thirty days after June 21, 1934, and it is provided—....
>
> (i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes

> may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes."

It has been held that the jurisdiction of the National Railroad Adjustment Board under these provisions is limited to the enforcement of contract rights of the parties and the Board has no authority to create rights other than those created by the contract between the parties.

Thus in *Southern Pacific Co. v. Joint Council Dining Car Employees,* 165 F.2d 26, *supra* in footnote 2, the Court of Appeals for the Ninth Circuit said:

> "Section 3, subd. First, Subsection (i), limits the jurisdiction of the Adjustment Board to disputes over the interpretation and application of contracts between carriers and their employees."

The court noted that the Board itself has interpreted its own powers the same way, and quoted the Board as saying:

> "From its inception this Board has consistently held that its functions are limited to interpreting and applying the rules agreed upon by the parties. . . ."

In *Thomas v. N. Y. Chicago & St. L. R.R.*, 185 F.2d 614, *supra*, the Court of Appeals for the Sixth Circuit, in passing upon a claim of wrongful discharge which had been presented to the National Railroad Adjustment Board, said:

> "Appellant was entitled to reinstatement only if wrongfully discharged; he was wrongfully discharged only if some right arising out of contract or the law was violated by his discharge."

In the present case, therefore, the plaintiff cannot rely upon any decision of the National Railroad Adjustment

Board unless he can point to some provision of some contract limiting the right of the carrier to rely upon the decision of its Chief Surgeon as to the physical ability of employees to operate engines on trains.

The decision of the National Railroad Adjustment Board in this case does not cite any contract provision limiting in any way the right and duty of the railroad to see that only employees determined by it to be physically qualified are entrusted with the responsibility of operating its trains and other equipment. Under the circumstances it is clear that the award of the National Railroad Adjustment Board, First Division, was in excess of the jurisdiction of the Board.

CONCLUSION

In compliance with the undisputed requirement that locomotive engineers over seventy years of age must take and pass quarterly physical examinations in order to operate locomotives on trains, petitioner was examined and disqualified on December 31, 1954, by reason of the presence of a heart disease which could lead to a coronary episode. Thereafter, petitioner obtained what the Adjustment Board later considered to be a "generally equivocal" (R. 8) but conflicting opinion of another doctor. Solely on the basis of this, and without any basis in the Engineers' agreement, the Adjustment Board ordered that a compulsory arbitration panel of three doctors should be convened to decide the physical qualifications of petitioner. Concluding that the arbitration was favorable to petitioner, the Board ordered the carrier to reinstate petitioner and pay him for all time lost since October 15, 1955. The carrier refused to comply with the order as provided in 45 U.S.C. 153, First (p), because the Board had exceeded its jurisdiction in writing

a contractual arbitration provision for the parties in cases where the doctors have disqualified engineers upon physical examination.

The petitioner was General Chairman of the Firemen's Union, worked as an engineer and handled disputes for other engineers under the agreement with which he was thoroughly familiar. No claim is or could be made that there was any lack of good faith on the part of the carrier or its doctors. Despite his qualifications the petitioner at all times to the date of judgment in this case understood that there was no provision for arbitration by three doctors in the agreement (R. 222). The court accordingly held that the undisputed facts proved that no such arbitration provision existed; that the decision of the Chief Surgeon was final and that the Board had exceeded its function of "interpretation" of collective bargaining agreements. The petitioner had repeated invitations from the court to introduce any contrary facts over the period of some thirteen months herein and during the prior proceeding reported in 198 F. Supp. 402. No such facts were presented and there was no genuine issue of material fact to preclude the issuance of summary judgment on October 27, 1961.

Some eight months thereafter petitioner moved the court to reopen the judgment to admit newly discovered evidence which he assertedly could not theretofore have discovered by the exercise of due diligence. The court denied this motion, after hearing, on the basis that petitioner had not instituted any discovery at all during the four-year period of litigation; that petitioner's argument that the Engineers' Union would not show him their files could not overcome the fact that eight months before the date when he filed this petition he issued a power of attorney to the Engineers' Union to handle this very case on his behalf and to settle,

prosecute or appeal it to a conclusion; and that there was not a shred of evidence to support his claim of excusable neglect or use of due diligence. The court nevertheless heard and considered the evidence offered by petitioner and found that it would not show the existence of such a three-doctor arbitration panel in carrier's agreement even if it were admitted into the case.

It is respectfully submitted that the judgment of the District Court should be affirmed.

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William R. Denton
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James W. Archer,
Eugene L. Freeland
Of Counsel

Dated April 30, 1964.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

W. A. Gregory
Attorney for Appellee

Dated: April 30, 1964

18726

No. [redacted]

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CHARLES THOMAS YEAMAN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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TOPICAL INDEX

TABLE OF AUTHORITIES CITED

No. 63-66-S Civil

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CHARLES THOMAS YEAMAN,

Appellant,

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Appellee.

APPELLEE'S BRIEF.

I.

Statement of the Pleadings and Facts Disclosing Jurisdiction.

On August 9, 1961, the Federal Grand Jury for the Southern District of California, Central Division, returned a One-Count Indictment charging that the appellant, Charles Thomas Yeaman, on or about June 23, 1960, unlawfully transported in interstate commerce from Las Vegas, Nevada, to Los Angeles, California, a stolen 1960 Chevrolet in violation of Section 2312 of the Title 18, United States Code.

On December 11, 1961, the appellant appeared before the Honorable Harry C. Westover in United States District Court, Southern District of California, and pleaded guilty to the indictment. David Kenyon, a member of the Federal Indigent Panel, was appointed to represent the appellant in the District Court proceedings.

On January 2, 1962, the appellant again appeared before the Honorable Harry C. Westover and was committed to the custody of the Attorney General for five years.

On January 21, 1963, the appellant filed an "Application for a Writ of Habeas Corpus" with the District Court. On January 30, 1963, the Honorable Albert Lee Stephens, Jr., denied the relief sought by the appellant.

On June 6, 1963, the appellant filed a notice of appeal *nunc pro tunc* February 27, 1963.

The jurisdiction of the District Court is based on Section 2312 of Title 18, and Section 2241 of Title 28, United States Code. The appeal is taken to this Court pursuant to Title 28, United States Code, Section 1291.

II.

Statutes Involved.

The Sixth Amendment of the Constitution provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

18 United States Code, Section 2312 provides:

"Whoever transports in interstate or foreign commerce a motor vehicle or aircraft, knowing the same to have been stolen, shall be fined not more than $5,000 or imprisoned not more than five years, or both."

28 United States Code, Section 2241, provides in part:

"(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

"(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the applicant on for hearing and determination to the district court having jurisdiction to entertain it.

"(c) The writ of habeas corpus shall not extend to a prisoner unless—

"(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

"(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

"(3) He is in custody in violation of the Constitution or laws or treaties of the United States; . . ."

III.

Questions Presented.

The appellant, proceeding *in propria persona,* apparently raises three questions in his "brief."

(1) Did the District Court err in denying the petition for a Writ of Habeas Corpus, a petition based on a claim of lack of speedy trial?

(2) Did the District Court err in denying the petition for a Writ of Habeas Corpus, a petition based on the sentencing court's failure to run the instant Federal sentence concurrently with a previously imposed State sentence?

(3) Did the District Court violate its discretion in denying the appellant's petition without holding a hearing in his presence?

The Government is cognizant of the fact that the appellant's "Brief" is not in concord with the rules of this court and the government also recognizes that this Honorable Court might wish to dismiss the appeal for that reason. In view of the fact, however, that the appellant is proceeding *in propria persona* and *in forma pauperis,* the government has replied to the pleading.

IV.

Statement of the Case.

Since the petition for the Writ of Habeas Corpus did not sufficiently set for the relevant facts, the District Court made the necessary thorough search of the original case file prior to ruling on the petition, as the order denying the petition states. [C. T. 4.][1]

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[1]C. T. refers to Clerk's Transcript of Record.

The order notes the dates of indictment, plea, and sentencing, as previously stated, and goes on to state that the files of the Superior Court of the State of California indicate that the appellant was sentenced by the court on September 16, 1960, to six months to fourteen years imprisonment for violation of California Penal Code, Section 470, and was released on parole from the State penitentiary on November 28, 1961. [C. T. 4.]

The court concluded that since appellant was indicted within the period allowed by the Statute of Limitations, since he made no effort to speed his trial, nor to raise an objection based on the grounds of lack of speedy trial, and since he had not made a showing of prejudice, his claim to relief on this ground should be denied. [C. T. 5.]

The District Court stated that the appellant's request that the time he served in State prison should be applied to his Federal sentence was considered by the court as a motion for modification of sentence pursuant to Rule 35 of the Federal Rules of Criminal Procedure.

The District Court stated that this motion was denied on the grounds that the sentence was not illegal since the sixty day period during which modification might be made had elapsed prior to the filing of the motion, and since a Federal sentence could not be made concurrent with a sentence which had already been served. [C. T. 5-6.]

V.
Summary of Argument.

A. The District Court did not violate its discretion in denying the petition without holding a hearing since the petition raised no factual issues upon which relief could be granted.

B. The District Court did not err in denying the petition based on a claim of lack of speedy trial since the appelant was indicted within the period of limitations, made no effort to speed the trial, did not object on this ground, and could show no prejudice.

C. The District Court did not err in denying the petition based on the claim that the appellant's State and Federal sentences should have run concurrently since a sentence cannot be concurrent with a period of time which anteceded its imposition and since the sentence imposed is a legal sentence.

VI.
Argument.

A. The District Court Did Not Violate Its Discretion in Denying the Petition Without Holding a Hearing Since the Petition Raised No Factual Issues Upon Which Relief Could Be Granted.

It is well established there is no requirement that the District Court hold a plenary hearing before ruling on a petition for a Writ of Habeas Corpus or a motion under Title 28, Section 2255 where there are no material facts in issue and only questions of law before the court which are capable of easy resolution.

Sanders v. United States, 373 U. S. 1 (1962);
Marchibroda v. United States, 368 U. S. 487 (1961);
Boyden v. Webb, 208 F. 2d 201 (9 Cir. 1953);
Craig v. Hunter, 167 F. 2d 721 (10 Cir. 1948).

In the instant case the District Court examined the original files in order to determine the relevant facts and stated these facts in the order denying the petition. [C. T. 4.] It might be noted that the appellant does not question this statement of the facts in his brief.

As will be shown in Sections B and C of the Argument, the uncontested facts before the District Court did not present any basis upon which relief could be granted.

Since there were only these questions of law before the District Court and no material facts in issue, the District Court did not violate its discretion in denying the petition without a hearing whether the petition is considered to be a motion under Section 2255 of Title 28 or a petition for habeas corpus. Therefore, the appellant's claim for relief should be denied.

B. The District Court Did Not Err in Denying the Petition Based on a Claim of Lack of Speedy Trial Since the Appellant Was Indicted Within the Period of Limitations, Made No Effort to Speed the Trial, Did Not Object on This Ground, and Could Show No Prejudice.

As the District Court stated in denying the petition:

> "The indictment was returned within the period of limitations and no effort is shown on the part of petitioner to speed trial or to object to prosecution on this ground, nor is prejudice shown to have resulted."

Under such circumstances it is obvious that the appellant's claim of violation of his Sixth Amendment

Rights cannot be sustained and the District Court ruled correctly.

Glenn v. United States, 303 F. 2d 536 (5 Cir. 1962);

United States v. Korge, 251 F. 2d 87 (2 Cir. 1958);

Morland v. United States, 193 F. 2d 297 (10 Cir. 1951);

D'Aquino v. United States, 192 F. 2d 338 (9 Cir. 1951).

C. The District Court Did Not Err in Denying the Petition Based on the Claim That the Appellant's State and Federal Sentences Should Have Run Concurrently Since a Sentence Cannot Be Concurrent With a Period of Time Which Anteceded Its Imposition and Since the Sentence Imposed Is a Legal Sentence.

The appellant's argument that his Federal and State sentences should have run concurrently cannot overcome the obvious obstacle that a sentence cannot be concurrent with a period of time which anteceded its imposition. *Godwin v. Looney,* 250 F. 2d 72, 74 (10 Cir. 1957). For this reason the trial court could not when it sentenced the appellant on January 2, 1962, have even *recommended* that his Federal sentences run concurrently with a State sentence from which the appellant had been released on parole on November 28, 1961, over a month prior to the sentencing in Federal Court.

It should also be noted that under Section 3568 of Title 18, United States Code, a sentence shall commence to run from the time when the defendant is received at the institution of confinement for service of sentence.

As the District Court stated the sentence imposed by the trial court is a legal sentence, within the maximum possible under Title 18, Section 2312 of the United States Code.

The District Court stated that it considered the appellant's pleadings to also constitute a motion for reduction of sentence and denied that motion. There was, of course, no alternative to such a ruling in view of the limitation imposed by Rule 35 that such a motion be made within sixty days after the imposition of sentence. Approximately a year had passed between the imposition of sentence and the date of the filing of the petition.

VII.

Conclusion.

Since the uncontested facts, as determined by the District Court after examination of the files, when coupled with the appellant's petition failed to present any basis upon which relief could be granted, the decision of the District Court should be affirmed.

Respectfully submitted,

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United States Attorney,

THOMAS R. SHERIDAN,
Assistant U. S. Attorney,
Chief, Criminal Section,

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Attorneys for Appellee
United States of America.

Certificate.

I certify that in connection with the preparation of this Brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion the foregoing brief is in full compliance with those rules.

ROBERT L. BROSIO
Assistant U. S. Attorney

No. 18729

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION,

Appellant,

vs.

JAMES A. A. SMITH, etc.,

Appellee.

APPELLANT'S OPENING BRIEF.

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TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Cases

Statutes

No. 18729

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Appellee.

APPELLANT'S OPENING BRIEF.

I.

JURISDICTIONAL STATEMENT.

This matter arose as a result of a Petition in Reclamation filed by Appellant, Bank of America National Trust and Savings Association (herein called "Bank"), in the Bankruptcy Court against Appellee, James A. A. Smith, Trustee in Bankruptcy of Conair, Inc., Bankrupt (herein called "Trustee"). The Petition in Reclamation by Bank claims payment from the Trustee of moneys coming into his possession as a result of collections by him on accounts receivable of Conair [Tr. 20-28]. The Bank is assignee of written assignments of Conair account receivable moneys [Tr. 30 and 34]. The Referee in Bankruptcy signed Findings of Fact, Conclusions of Law and an Order that the Bank should

pay the sum of $21,554.66 to the Trustee for account receivable moneys that the Bank has collected and that upon receipt of that sum the Trustee should pay to the Bank the sum of $23,509.90 for account receivable moneys that he has collected [Tr. 39-43]. The Bank filed a Petition for Review and, on March 6, 1963, Judge Westover filed and entered an Order Affirming the Referee's Order [Tr. 57-58]. On April 4, 1963 the Bank filed its Notice of Appeal to this Court [Tr. 60-61].

The jurisdiction of the United States Court of Appeals was invoked pursuant to the provisions of Section 1291, Title 28 and Section 47, Title 11, United States Code.

II.

STATEMENT OF THE CASE.

The Bankrupt, Conair, Inc. (herein called "Conair"), filed a debtor's Petition under Section 322 of Chapter XI of the Bankruptcy Act on November 1, 1960 [Tr. 20 and 30], and, thereafter, on January 4, 1961 it was adjudicated a bankrupt [R. 18].

Prior to the bankruptcy proceedings the Bank had loaned the sum of $109,000.00 to Conair for which Conair had given its promissory note to the Bank, dated July 22, 1960, in that principal amount [Tr. 21 and 30]. As a method of providing for the repayment of this debt, Conair assigned to the Bank the proceeds of its accounts receivable that were to result from the manufacture of goods by Conair for its customers under contracts that it had with them, and Conair between September 22, 1960, and November 1, 1960, executed instruments that assigned to the Bank "all

monies now due or which may hereafter become due to the assignee from" Conair's named customers [Tr. 30 and 34].

This arrangement for the assignment of the accounts receivable from Conair to the Bank was further confirmed by Notice of Assignment of Accounts Receivable dated September 21, 1960 that was filed with the County Recorder in the County of Los Angeles, State of California on September 22, 1960 [Tr. 21 and 30]. Payments were received by the Bank on that promissory note and on September 28, 1960 the principal unpaid balance on it was $69,000.00 [Tr. 21 and 30].

A renewal note in the principal sum of $69,000.00 was given by Conair to the Bank on September 28, 1960 [Tr. 21 and 30]. The present unpaid balance of the outstanding, renewal note, dated September 28, 1960, after application of all payments received by the Bank, is the sum of $24,654.68 and interest [Tr. 30].

The Trustee went out to Conair's place of business on either October 31 or November 1, 1960 [R. 7], and he testified that he determined as follows:

> "There were orders that were unfilled, stock that was purchased for these unfilled orders, and in determining between ourselves it would be best for the benefit of the creditors to convert this into completed merchandise and invoice it out and that we would satisfy the customers and bring more benefit to the creditors, an order was obtained to go ahead and operate the business" [R. 16].

The Trustee was appointed Receiver of Conair on November 2, 1960, one day after its debtor's Petition

was filed, and the Order of Appointment also authorized the Trustee, as receiver, "to continue and carry on with the business as conducted by the said Debtor until further Order of this Count" [Tr. 2-3].

The Trustee did continue the operation of the business of Conair, and on November 22, 1960 he filed his report of operations for November 1 to November 15, 1960 in which he stated that: "Prior to the filing of the plan of arrangement the Debtor had assigned their accounts receivable to the Bank of America for the purpose of securing a purported prior unsecured indebtedness" [Tr. 5], and further stated that "Among the assets turned over to your Receiver was work in process of $96,606.03 which will be consumed in the operation and can be accounted for under the cost of materials on the reports" [Tr. 6].

On a Petition dated November 7, 1960, it was ordered by the Bankruptcy Court on November 23, 1960 that the Trustee, as Receiver, was authorized to employ the President of Conair, Robert F. Feland, as the General Manager of the operation of Conair [Tr. 14-15]. According to the Trustee's testimony he instructed Feland as follows: "That we had a certain amount of merchandise and materials purchased for these different customers, which, in the usual procedure, was valuable, but we had merchandise on the shelves which would bring us overproduction unless we shipped it. I told him if they needed to, to go ahead and sell it or *if these contracts were still good* and they would accept them, to go ahead and convert the material and work in process on hand to complete merchandise to delivery" [R. 40-41; emphasis added].

The Trustee was appointed as trustee of Conair on January 4, 1961 [R. 19], and the Referee's Order of January 5, 1961 authorized the Trustee to continue the current operation of the business of Conair [Tr. 16-17].

According to the two written stipulations [Tr. 29-35] signed and filed by the Trustee and the Bank, the method by which the account receivable moneys were generated, to which the Bank makes claim by virtue of its assignments, was as follows:

Conair entered into basic contracts with its customers relating to the manufacture of goods by Conair; from time to time the customers would issue job purchase orders to Conair that requested the delivery of specific goods manufactured by Conair; when the goods were delivered by Conair to the customers, invoices would be sent to the customers [Tr. 30].

The Trustee, according to the written sitpulations [Tr. 30 and 34], has collected and retains possession of the total sum of $55,301.35 from customers of Conair for products manufactured according to purchase orders received by Conair prior to November 1, 1960 under these basic contracts. A part of that total amount of $55,301.35 collected by the Trustee, the sum of $23,-509.90, came from the collection of accounts receivable for goods manufactured and delivered by Conair before November 1, 1960 [Tr. 30-31].

On the other hand, the Bank itself has collected on some other accounts receivable, and the Bank has thereby obtained the total amount of $21,554.66 that was paid by customers of Conair for goods delivered and invoiced by the Trustee after November 1, 1960 [Tr.

31]. A part of that amount so collected by the Bank, the sum of $11,450.59, was paid on accounts receivable by Conair's customer, Litton Industries, Inc., on three invoices [Tr. 31-32]. The manufacture of the goods for these Litton Industries accounts receivable was commenced prior to November 1, 1960 and completed after that date [Tr. 31-32]. The basic contract for the delivery of those goods to Litton Industries, as with the other accounts receivable, was entered into by Litton Industries and Conair before November 1, 1960, and the three invoices for these accounts receivable were dated, respectively, November 4, 10 and 14, 1960 [Tr. 31-32].

There has been no contention by the Trustee or his counsel that the Trustee entered into new contracts for the manufacture of the goods from which he collected the $55,301.35 [R. 36-37], but the Trustee attempted to show that it was not his subjective intention to assume Conair's contracts with its customers under which the Bank is entitled to sufficient proceeds to pay its promissory note [R. 12-13].

Nevertheless, the Trustee, even in his attempt to explain his position in the dispute with the Bank that started in November, 1960, testified that: "It has always been our custom, when we take and go in, to complete the work in process, if it is profitable, by an order of the court. We operate to convert into merchandise that work in process, invoice it to the customer, as far as the job orders go, and deposit the monies in the bank" [R. 30]. More specifically, the Trustee testified in answer to a question as to whether he had attempted to negotiate any new contracts as follows: "No, only the new purchase orders that would

come in following this, or where a salesman would go out and get new orders" [R. 35]. He further testified that the new orders to which he referred were not related to the $55,301.35 from which the Bank claims [R. 35].

The Referee in Bankruptcy signed and filed findings that the Trustee did not intend to nor purport to assume the executory contracts between Conair and its customers under which the accounts receivable proceeds were assigned to the Bank, despite the written stipulations between the Trustee and the Bank which were incorporated into the findings and the Trustee's own testimony, and also that the Trustee had not applied to the Court for authority to assume any executory contracts, and the Referee concluded that the executory contracts had been rejected by the Trustee [Tr. 40-42].

The Order of the Referee in Bankruptcy was affirmed by the District Court on Review, without a written opinion and the Findings of Fact and Conclusions of Law of the Referee were adopted [Tr. 57-58].

The order from which the Bank appeals to this Court is that the Bank shall pay to the Trustee the sum of $21,554.66, the amount of money collected by the Bank on accounts receivable for goods completed and delivered after November 1, 1960, and that the Trustee, in turn, shall upon receipt of that sum, pay to the Bank the sum of $23,509.90 as the amount of accounts receivable money collected by the Trustee upon which the goods were delivered prior to the filing of Conair's petition as a debtor on November 1, 1960 [Tr. 43 and 58].

III.
SPECIFICATIONS OF ERRORS.

The Order Affirming Referee's Order of December 27, 1962 is contrary to the facts and law because:

The Trustee assumed and performed executory contracts that Conair had with its customers for the delivery of goods, and the resulting account receivable moneys, that Conair had assigned to the Bank, belong to the Bank in an amount sufficient to pay the Conair promissory note.

IV.
SUMMARY OF ARGUMENT.

The Bank's entitlement to payment from assigned account receivable moneys in an amount sufficient to pay the balance on the Conair promissory note follows from the two written stipulations of facts between the Trustee and the Bank and the Trustee's own testimony, including oral stipulations pertaining thereto, the Orders of the Bankruptcy Court for the operation of the business of Conair by the Trustee, and the failure of the Trustee to deny the allegations of the Petition in Reclamation. The application of the facts to the law means that the Trustee, by assuming and performing the executory contracts, thereby became obligated to the Bank on its assignments.

V.
ARGUMENT.

1. The Facts That Are Really Undisputed Show That the Trustee Assumed and Performed the Executory Contracts, and This Court May so Determine.

The Trustee assumed and performed executory contracts under which the Bank is entitled to receive payment under its assignments of accounts receivable. This Court is entitled to examine the written stipulations between the Trustee and the Bank, which the Trustee's own testimony fully support, and arrive at its own conclusion concerning whether or not the Trustee assumed the executory contracts of Conair. In the case of *Tepper v. Chichester,* 285 F. 2d 309 (9th Cir. 1960), which was also a bankruptcy reclamation case, the court said (p. 312):

> "In a case such as this, where there is no real dispute as to the facts, we may examine the issues and arrive at our own conclusions from such given state of facts."

The written stipulations demonstrate without contradiction that the Trustee performed and assumed the executory contracts and, moreover, the Findings of Fact by the Referee, adopted by Judge Westover, incorporated those stipulations as some of the Findings of Fact [Tr. 40 and 57-58]. The further finding that the Trustee did not intend to assume any executory contracts but merely filled job orders to liquidate the assets [Tr. 40-41] is immaterial under the applicable law and contrary to the stipulated facts.

The Trustee himself testified many times to the effect that he did perform the executory contracts. On one occasion the Trustee testified as follows: "After being appointed Receiver and obtaining an order to continue operation and to complete the work in process, it was completed and delivered and I invoiced the customers" [R. 8]. The written stipulations were referred to at the hearings in the Bankruptcy Court in which counsel for the Bank asked the Trustee as follows: "As to the figure $55,301.35 which is referred to in the original stipulation on page 2, at line 24, and then further in the supplemental stipulation on page 1, *you entered into no new purchase orders or contracts* in connection with any of those accounts receivable? Is that a correct statement?" [R. 36; emphasis added]. Thereupon counsel for the Trustee stated: *"We have stipulated that is a correct statement, Mr. Taylor"* [R. 37; emphasis added]. It was further stipulated by the Trustee's counsel that the Trustee had not filed any report with the Court stating that he had rejected any executory contracts [R. 94].

The Orders of the Bankruptcy Court specifically authorized the Trustee to continue and carry on with the business of Conair [Tr. 2-3 and 16-17], and the entire record shows that this is what the Trustee did.

Not only do the stipulations show that the Trustee assumed and performed the executory contracts, but the Trustee filed no answer to the Bank's Petition in Reclamation which alleges that the Trustee collected $55,-301.35 upon accounts receivable assigned to the Bank by Conair and upon which the related contracts therefor were entered into by Conair and the account receivable obligors prior to November 1, 1960 [Tr. 21-22].

2. There Is No Requirement That the Bankruptcy Court Must Have Expressly Authorized the Trustee to Assume the Executory Contracts, and His Assumption Made Him Liable to the Bank on Its Assignments.

The case most similar to this one is *In re Italian Cook Oil Corp.,* 190 F. 2d 994 (3rd Cir. 1951), in which one of the Trustees contended that the performance of the contract did not constitute an adoption of it by the Trustees so as to subject them to a claim under the assignment. The Court in the *Italian Cook Oil* case, *supra,* held that the performance of the executory contract constituted an adoption of it and that the Trustees were bound under the valid equitable assignment of the proceeds of the contract to the assignee-bank; the court said (p. 996):

> "By Section 70, sub. b of the Act, the trustee is given the right to adopt or reject an executory contract. He must do one or the other. If the trustee deems the contract to possess no equity or benefit for the estate he rejects it as burdensome. If, on the other hand, he concludes that the executory contract does have an equity for the estate he adopts it. These principles of law have become too well established to permit of doubt."

The Court further said in the *Italian Cook Oil* case, *supra* (p. 997):

> "The trustee, however, may not blow hot and cold. If he accepts the contract he accepts it *cum onere.* If he receives the benefits he must adopt the burdens. He cannot accept one and reject the other."

The case of *In re Tidy House Products Co.,* 79 F. Supp. 674 (S.D. Iowa, 1948) held that the trustee

had impliedly assumed the executory contract by acceptance of the benefits of it and that he was, therefore, liable for the burdens of paying the money due under it. The Court in the *Tidy House* case, *supra,* concerning rejection of executory contracts under Section 70, sub. b, of the Bankruptcy Act said (p. 676):

> "Nothing appears that would indicate that the trustee had made such an election with reference to this executory contract or that the trustee had filed the report as required by the provisions of the Act just set out, or has abandoned the contract as burdensome."

The *Tidy House* case further says (p. 676):

> "When a trustee adopts an executory contract, he assumes the liabilities. * * * If the contract is rescinded, then there would in effect be an abandonment of the entire contract and the bankrupt estate could have no benefits therefrom."

There are other cases in which the courts have held that the assumption of the executory contracts created a duty to perform the burdens. In the case of *In re DeLong Furniture Co.,* 188 Fed. 686 (E. D. Penn., 1911) the Court said (pp. 686-687):

> "Neither the receiver nor the trustee was bound to adopt and complete the contracts, and, if neither had undertaken to complete, there would have been no money to which the furniture company's assignment could apply, and the bank would have been compelled to accept the situation. But the receiver and the trustee did adopt and did carry out the contracts, and in my opinion they stepped thereby into the furniture company's shoes * * *."

Also in the case of *In re Swindle,* 188 Fed. Supp. 601 (Ore. 1960), the Court held that the trustee by adoption of the contract thereby became liable to accept the burdens with the benefits of it.

There are a number of cases in which the courts have held that the trustees by their conduct in performing executory contracts had thereby adopted them. In the case of *In re Public Ledger, Inc.,* 161 F. 2d 762 (3rd Cir. 1947), the Bankruptcy Court had ordered the trustees to continue the operation of the business, but the business was thereafter shut down before the employees could take their vacations and they filed claims for vacation pay; the Court held that the contract of employment had been assumed by the trustees and said (p. 765):

> "The denial of the claims was upon the ground that the contract providing for vacation with pay had never been assumed by the trustees, and upon the further ground that the contract could not be assumed legally without the court's specific authorization, which was never given."

The Court in the *Public Ledger* case, *supra,* answered the contentions of the trustees and said (p. 765):

> "The evidence is all one way, however, that no act of the trustees was inconsistent with the terms of the contract, and that every act of the trustees in relation to the employees was in complete accord with its terms."

The Court in the *Public Ledger* case, *supra,* further said (p. 765, footnote No. 1):

> "It should be noted that the Act does not specify the manner of acceptance of an executory con-

> tract. Though a trustee must list all executory contracts within sixty days as well as which of them have been rejected, it is not clear as to the manner of showing those executory contracts which have been accepted. Acceptance may be by conduct as well as by a writing or by oral statement."

The Court in the case of *In re McCormick Lumber & Mfg. Corp.,* 144 Fed. Supp. 804 (Ore. 1956), held that the trustee had assumed a conditional sales contract and said (p. 805):

> "In other words, the trustee is given a sixty day breathing spell within which to determine whether or not the estate should abandon a 'white elephant' or perform a beneficial contract, and, further, relieves the bankrupt's estate from accumulating liabilities unless the trustee takes 'affirmative' action."

It was held in the case of *In re Forger Metal Products,* 229 F. 2d 799 (3rd Cir. 1955), that by the acts of the trustee and the implications of the Order of the Bankruptcy Court, the trustee had assumed the executory contract and the Court said (p. 801):

> "As we view it the entire record points to assumption of the contract in substantial compliance with Section 70, sub. b."

The Bankruptcy Court in the instant case, as in the *Forger Metal Products* case, *supra,* gave the trustee implicit authority to assume the executory contracts under its Order of November 2, 1960 whereby the receiver was "authorized and empowered to continue and carry on with the business as conducted by the said Debtor * * *" [Tr. 3].

The case of *In re Luscombe Engineering Company,* 268 F. 2d 683 (3rd Cir. 1959), strongly relied upon by the Trustee, does not support the proposition that Section 70, Sub. b, of the Bankruptcy Act requires an Order of the Bankruptcy Court for the assumption of an executory contract, otherwise there would have been no reason for the court in that case to have discussed in detail the actions by the trustee that were contended to have constituted an assumption of the executory contracts. The Court in the *Luscombe* case, *supra,* held that there had not been an assumption of the executory contracts, but in that case the trustee had entered into subsequent agreements, transactions, bargaining and newly agreed methods for payment. This course of negotiations and subsequent agreements between the trustee and the other parties to the executory contracts is set forth in the *Luscombe* case, 268 F. 2d at page 686; the Court also said (p. 686):

> "It is to be emphasized that we have here no express or even clearly implied assumption of a bankrupt's contract. The claimant's argument at most suggests ambiguous conduct by trustee and contractor which makes at least as much sense interpreted as a new contract as it does interpreted as an assumption of the old."

In the instant case the trustee assumed and performed the executory contracts under which the account receivable moneys had been assigned by Conair to the Bank, according to the Trustee's stipulations and testimony. There was no evidence whatever that the Trustee entered into new and different contracts, and, in fact, it was stipulated that he did not [R. 36-37].

3. The Bank Is Entitled to Sufficient Proceeds From Account Receivable Moneys to Pay the Conair Promissory Note.

The Bank has collected the sum of $21,554.66 in account receivable moneys that the Bankruptcy Court has ordered it to pay over to the Trustee. The Bank is entitled to retain a part of that amount, the sum of $11,450.59, which was paid to the Bank by Conair's customer, Litton Industries, Inc., on the three invoices dated respectively November 4, 10 and 14, 1960. It was stipulated by the Trustee that the basic contract for the delivery of the goods, which were partly manufactured prior to November 1, 1960, on those accounts receivable, was entered into between Litton Industries, Inc. and Conair prior to the date of November 1, 1960 [Tr. 31-32].

Under Section 313, sub. (1), Chapter XI, of the Bankruptcy Act, executory contracts can only be rejected by an order of the Bankruptcy Court upon notice to the parties to such contracts. There was no order of the Bankruptcy Court permitting the Trustee, as receiver or trustee, to reject the executory contract with Litton Industries, Inc., and Conair was not adjudicated a bankrupt until January 4, 1961 [R. 18]. The Bank is, therefore, entitled to retain the sum of $11,450.59 collected by it on the Litton Industries, Inc. assignment of accounts receivable and to receive from the Trustee, from the fund of $55,301.35, a sufficient additional amount to pay the Conair promissory note.

VI.
CONCLUSION.

The Bank loaned the sum of $109,000.00 to Conair within a few months prior to the time that it filed a Debtor's Petition under Chapter XI of the Bankruptcy Act and took from Conair assignments of account receivable moneys, to come from executory contracts, as security for the loan and as a method of repayment. The Trustee assumed the benefits of the operation of the business of Conair and its executory contracts which had been financed by the Bank. The Trustee by such assumption also became subject to the liability to the Bank on its assignments. The Bank should receive payment of its promissory note, and the Trustee should retain the balance of substantial benefit derived from the operation of the business.

Respectfully submitted,

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Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

HARRIS B. TAYLOR,

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Appellee.

BRIEF OF APPELLEE.

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TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Cases

Statutes

Textbooks

No. 18729

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Appellee.

BRIEF OF APPELLEE.

Jurisdiction.

The Court has jurisdiction of this appeal under Section 24a of the Bankruptcy Act, 11 U. S. C. Sec. 47a.

Statement of the Case.

This is an appeal from an Order of the Honorable Harry C. Westover, United States District Judge, dated March 5, 1963 [Tr. 57-58],[1] which affirmed an or-

[1]To conform to the system adopted by appellant, references in this Brief to Volume I of the Transcript of Record (which contains the documentary matter) will be cited as "Tr." Citations to Volumes II and III containing the testimonial evidence will be designated as "R," with a reference to the page number as it appears in the typewritten reporter's transcript.

der of the Honorable Ray H. Kinnison, Referee in Bankruptcy, entered December 27, 1962 [Tr. 39-43].

Appellant filed its Second Amended Petition In Reclamation on July 6, 1962, seeking to recover the proceeds of certain accounts receivable which allegedly had been assigned to appellant by the bankrupt, but which had been collected by appellee-trustee in bankruptcy [Tr. 20-28]. To eliminate the necessity for complex evidence on the undisputed accounting phases of the case, appellant and appellee entered into a detailed stipulation of facts [Tr. 29-33] and a supplement thereto [Tr. 34-35]. These documents, together with appellant's pleading, framed the issues for the court's determination.

The matter was heard on September 27 and October 30, 1962, at which times certain evidence was introduced, both testimony and documentary exhibits. On December 18, 1962, the Referee rendered his memorandum opinion [Tr. 36-38], followed by the formal findings, conclusions and order on December 27, 1962 [Tr. 39-43]. He held, as indeed appellee had conceded, that appellant was entitled to reclaim the sum of $23,509.90, representing collections of accounts receivable by the trustee on invoices which had been assigned to appellant, and which arose as a result of the bankrupt's deliveries of merchandise to its customers before bankruptcy. He further held that the trustee was entitled to the sum of $21,554.66 collected by and in the possession of appellant, but representing merchandise delivered after bankruptcy and invoiced to the customers by appellee.

Appellant filed a timely Petition for Review insofar as the order was adverse to it [Tr. 45-47]. On March

5, 1963, the District Judge affirmed the Referee [Tr. 57-58].

Appellant filed its Notice of Appeal to this Court on April 4, 1963 [Tr. 60-61].

Statement of Facts.

On November 1, 1960, Conair, Inc. (sometimes referred to herein as the bankrupt), a California corporation engaged in the machine shop business, filed a petition under Section 322 of Chapter XI of the Bankruptcy Act, 11 U. S. C. Sec. 722. Appellee was appointed receiver the next day. Within the following two months, the arrangement failed, the court entered an adjudication, and appellee qualified as trustee in bankruptcy on January 4, 1961. In his latter capacity, as well as during the preceding receivership, he operated the bankrupt's business for a short time so as to be able to liquidate it on a going concern basis [Tr. 40, 53-54; R. p. 19].

The dispute in this case concerns the rights to collections made on certain accounts receivable allegedly assigned to appellant. While appellee concedes that the accounts belong to appellant to the extent that they are attributable to deliveries of merchandise made prior to bankruptcy, he claims all receivables generated during his operation of the business after the petition. Both types arose in the following manner: Basic contracts were entered into by the bankrupt with its customers covering work to be performed, in quantities as the customers might later order. Thereafter, the customers from time to time would issue job orders to the bankrupt calling for the manufacture of specific amounts of the product. When the work was com-

pleted and the product delivered, invoices for such deliveries would be sent to the customers [Tr. 30].

In September 1960, the bankrupt was indebted to appellant for $69,000.00 on unsecured loans. To put this debt on a secured basis, and to provide for its liquidation out of future business revenues, the bankrupt assigned to appellant the monies due or to become due under the basic contracts with its customers. As required by California Civil Code Sections 3017 *et seq.,* a "Notice of Assignment of An Account or Accounts" in general form was duly filed on September 22, 1960. Subsequently, the invoices for products delivered before bankruptcy were assigned by the bankrupt to appellant as they arose [Tr. 21, 27-28, 30].

When appellee assumed control after November 1, 1960, he filled certain job orders which were then on hand as a step in liquidating the assets of the estate. He did not know at that time that the basic contracts to which these job orders related had been assigned to appellant, nor did he intend to assume any of the bankrupt's executory contracts. Rather, he chose wherever possible to sell and deliver inventory on hand to customers who had placed job orders, since such a course naturally promised a greater realization than could be expected from a public auction of the physical inventory [Tr. 40-41; R. pp. 7-17, 95-96].

Appellee collected a total of $55,301.35 from customers whose basic contracts had been assigned by the bankrupt to appellant. Of this amount, $23,509.90 represents the proceeds of the bankrupt's assigned accounts receivable, *i.e.,* the proceeds of invoices created by the bankrupt through deliveries of its product before bankruptcy [Tr. 30-31]. Concededly, the funds to

this extent belong to appellant, and the courts below so held. The balance of appellee's collections arise out of deliveries made and invoices prepared by him after bankruptcy, *i.e.,* accounts receivable of the trustee as distinguished from accounts receivable of the bankrupt.

Appellant, too, has made certain collections. The monies received by it from all sources, totaling $44,345.32, reduced the principal amount of its claim against the bankrupt from $69,000.00 to $24,654.68 as of the time of the trial below. Included within these collections is the sum of $21,554.66 here in controversy.[2] This money in appellant's possession is attributable to invoices prepared and sent to customers by appellee after bankruptcy in connection with deliveries of merchandise made by him in his official capacity. The products thus delivered by the trustee were partially in process, partially finished goods, and partially in the raw materials stage when appellee first took possession of the bankrupt's assets at the time of the petition [Tr. 30-31]. The courts below ruled that these funds in the amount of $21,554.66 had derived from the trustee's receivables, rather than from the bankrupt's, and, therefore, belonged to the estate [Tr. 43, 57-58].

Statutes Involved.

Bankruptcy Act, Section 70a, 11 U. S. C. Sec. 110a:

> "The trustee . . . shall . . . be vested by operation of law with the title of the bankrupt as of the date of the filing of the petition initiating a proceeding under this Act. . . ."

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[2]If, as the courts below have held, appellant is liable to return its collections to the extent of the $21,554.66, its present claim against the bankrupt will be correspondingly increased.

Bankruptcy Act, Section 70b, 11 U. S. C. Sec. 110b:[3]

> "Within sixty days after the adjudication, the trustee shall assume or reject any executory contract, including unexpired leases of real property: *Provided, however,* That the court may for cause shown extend or reduce such period of time. Any such contract or lease not assumed or rejected within such time, whether or not a trustee has been appointed or has qualified, shall be deemed to be rejected. A trustee shall file, within sixty days after adjudication, a statement under oath showing which, if any, of the contracts of the bankrupt are executory in whole or in part, including unexpired leases of real property, and which, if any, have been rejected by the trustee: *Provided, however,* That the court may for cause shown extend or reduce such period of time."

Bankruptcy Act, Section 70c, 11 U. S. C. Sec. 110c:

> "The trustee, as to all property, whether or not coming into possession or control of the court, upon which a creditor of the bankrupt could have obtained a lien by legal or equitable proceedings at the date of bankruptcy, shall be deemed vested as of such date with all the rights, remedies, and powers of a creditor then holding a lien thereon by such proceedings, whether or not such a creditor actually exists."

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[3]Section 70b as set forth above reflects the statute as it existed during the period involved in this case. Effective September 25, 1962, Section 70b was amended in certain particulars not here material. Pub. L. 87-681, Sec. 9.

Questions Presented.

1. Will a trustee in bankruptcy, who chooses to fill purchase orders on hand solely as a means of liquidating the bankrupt's inventory, be deemed as a matter of law to have assumed without prior court approval the bankrupt's executory contracts under which the purchase orders were placed?

2. Only if the first question is answered in the affirmative: Does the assumption of the bankrupt's executory contracts with its customers also mean that the trustee as a matter of law is deemed to have assumed the executory agreement under which the bankrupt had assigned its future accounts receivable, when the assignee of those future accounts had no rights in the inventory used by the trustee in filling the purchase orders?

Summary of Argument.

The funds here in dispute represent only payments made by customers for merchandise delivered to them after bankruptcy by appellee in his official capacity. As of the date of the petition, the merchandise involved was in varying stages of completion. Regardless of its condition, however, appellant had no secured interest in nor lien upon it. Accordingly, the trustee's title to the inventory under Section 70a of the Bankruptcy Act was free and clear of any rights of appellant. Moreover, his status as a lien creditor under Section 70c of the Act was superior to appellant's position.

Nevertheless, appellant contends that it is entitled to the receivables created when the trustee delivered the inventory to customers after bankruptcy on job orders placed before bankruptcy. The theory in this

respect is that the trustee assumed the bankrupt's executory contracts, including its assignment to appellant of accounts receivable to arise in the future. For several reasons, however, the argument is untenable:

Appellee in this case certainly did not intend to assume any contracts, nor did he ask the court for authority so to do. Where possible, he filled job orders on hand solely as a means of liquidating the estate, selling the assets at what he believed would be the most favorable prices.

Executory contracts not specifically assumed by the trustee are deemed to be rejected under Section 70b of the Bankruptcy Act. While in unusual situations a trustee possibly might assume an executory contract without prior and express court approval, such a procedure is frowned upon. Plainly, an assumption without the court's consent is not to be implied from ambiguous conduct, particularly where, as in the present case, the result would be a detriment to the estate. A knowing conformity to the terms of a contract is not tantamount to adoption of it in the present context.

But even if it were found that the trustee had assumed the executory contracts between the bankrupt and its customers, it should not follow that he also assumed the executory contracts by which the bankrupt assigned to appellant the future receivables. The contracts under which the work was performed are separate and distinguishable from the contractual relationship between the assignor and assignee of the monies becoming due.

ARGUMENT.

A. Appellant Had No Secured Interest in the Physical Inventories Delivered by the Trustee in Creating the Accounts Receivable in Question.

All funds here in dispute represent payments made by customers for merchandise delivered to them after bankruptcy by the trustee in his official capacity. When appellee took possession of the bankrupt's business at the time of the petition, some of this inventory was in the finished goods stage; the balance was either work in process or in the form of raw materials, which required further manufacturing and other costs to complete. But appellant does not and could not contend that it ever had a lien or other security interest in the bankrupt's physical inventories, regardless of the degree of completion of any particular item. Although California law permits the creation of liens upon inventory under certain circumstances, *e.g.,* Civil Code Secs. 3030 *et seq.,* there was no attempt in the present case to finance in such a manner.

Accordingly, by virtue of Section 70a of the Bankruptcy Act, 11 U. S. C. Sec. 110a, the trustee took title to the inventory on the date of the petition free and clear of any rights in appellant's favor. His position in this respect, moreover, was bolstered by the strong-arm clause of Section 70c of the Act, 11 U. S. C. Sec. 110c. The clause in effect makes bankruptcy operate as a judicial seizure of the debtor's assets. A trustee is vested as of the moment of the petition with all the rights, remedies and powers of a levying creditor. He prevails over other claimants who ob-

tain their rights or perfect their secured interests after the lien of Section 70c attaches.

See generally, 4 Collier on Bankruptcy, pp. 1424-1425.

Appellant apparently does not dispute appellee's position up to this point. If the trustee had disposed of the inventory in any manner except to those customers who had placed job orders with Conair, Inc. before bankruptcy, the proceeds of his sales concededly would belong to the estate. And this would be true even though the persons purchasing the inventory from the trustee subsequently retransferred it to the same customers with whom appellee dealt directly in this case.

Nevertheless, appellant claims the proceeds of the trustee's sales on the theory that by filling job orders appellee necessarily assumed the bankrupt's executory contracts, including the contracts by which future revenues were assigned to appellant. This position is untenable as will be demonstrated below.

B. Appellee Did Not Assume the Bankrupt's Executory Contracts With Its Customers.

When, on the date of the petition, either the bankrupt or the other party has not fully performed under a pending contract, the trustee is confronted with the alternatives of assuming or rejecting the agreement. Section 70b of the Bankruptcy Act, 11 U. S. C. Sec. 110b, provides in part:

> "Within sixty days after the adjudication, the trustee shall assume or reject any executory contract. . . . Any such contract . . . not assumed or rejected within such time . . . shall be deemed to be rejected."[4]

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[4]Section 70b also requires the trustee to file a report within sixty days stating which executory contracts have been rejected.

As the leading treatise on the law of bankruptcy points out, this provision

> "makes it [the trustee's] duty within a prescribed period of time either to assume or reject, without, however, attaching any immediate sanction to a failure to elect except the operation of a conclusive statutory presumption that such failure amounts to a rejection. The real sanction is an indirect one, namely surcharge . . . if it is shown that the trustee's inactivity resulting in rejection constituted . . . neglect. . . ."
>
> 4 Collier on Bankruptcy, pp. 1353-1354.

Certainly, appellee never intended to assume any executory contracts, nor did he request the Referee for authority to do so. Wherever possible, however, he chose to sell and deliver inventory on hand to those customers who had placed job orders. For this means of liquidating the assets of the estate naturally prom-

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Failure to comply in this respect, however, has no direct legal consequences. 2 Remington on Bankruptcy, pp. 617-618, comments as follows on this provision: "While §70(b) requires the trustee to file a list of executory contracts of the bankrupt stating which he has rejected, it appears that this is primarily a report, and effective rejection can already have taken place either by affirmative notice to that effect or by failure to assume the contract within the time prescribed for adopting it."

It is entirely misleading for appellant to suggest that Section 313(1) of Chapter XI, 11 U.S.C. Sec. 713(1), has anything to do with this case (Op. Br. p. 16). That section provides that upon the filing of an arrangement petition, the court may permit rejection of an executory contract after notice to the other contracting party. But failure to reject under Section 313(1) does not mean that the debtor or receiver has assumed the contract. On the contrary, executory contracts in Chapter XI may be rejected at any time before confirmation of the plan; it is not uncommon for the plan itself to provide for rejection. Bankruptcy Act, Sec. 357(2), 11 U. S. C. Sec. 757(2). And where, as here, bankruptcy supersedes the Chapter XI proceeding, Section 70b comes into play and Section 313(1) has no applicability at all.

ised a greater realization than would a public auction [Tr. 40-41].

It should be emphasized that filling a job order, as appellee did in certain instances, was not a full compliance with the basic contract under which the order was placed. The basic contracts, of course, called for deliveries to be made over considerable periods of time and in quantities beyond appellee's ability to meet. What occurred in the present case is analogous to the situation of a trustee who temporarily occupies premises leased to a bankrupt. Absent an express, intentional assumption of the lease with court approval—a decision which involves the undertaking of any long-term liabilities—the trustee is not deemed to have adopted the contract. Rather, his conformity to the lease terms makes him liable to pay the reasonable value of the use only for the period he retains possession. While such value is normally measured by the rent reserved in the lease, it does not follow that the trustee assumed the contract itself.

See 4 Collier on Bankruptcy, pp. 1374-1376.

Yet appellant attempts to spell out assumption of executory contracts solely from appellee's course of conduct in delivering inventory in fulfillment of orders on hand. There is no contention that the court expressly authorized the alleged assumptions; indeed, appellant denies that such permission is required (Op. Br. p. 11). In this connection, however, appellant errs by failing to distinguish between the court's supervisory

responsibilities over rejections of executory contracts, on the one hand, and assumptions on the other. As Collier states:

> ". . . it can not be considered as the intent of the Act that the trustee in order to *reject* an executory contract should first apply to the bankruptcy court and act by express order of the court. It may be safe and wise to do so, but it is not a legal prerequisite. . . .
>
> "The situation is different as to *assumption* of 'executory' contracts. Section 70b does not require the trustee to state which contracts he assumed. The reason for this differentiation is certainly not that it is of less importance. . . . On the contrary, the relative importance may be even greater. In this connection the principle . . . that an assumption of liabilities results in an increased charge to the estate of expenses enjoying the first rank of priority adds significance to the silence of § 70b regarding the report of contracts *assumed* by the trustee. The general rule that economy of administration calls for close, strict, and active control by the court of all administrative expenditure seems to lead to the conclusion that it is improper for a trustee to assume executory contracts on his own responsibility. He should consider the advisability of assuming a contract according to this best judgment and give the court all the benefit of his practical experience, if any. But the proper procedure is for the trustee to apply to the court for an order authorizing him to assume the contract if this is what his judgment advises him is the proper course. The court should pass upon

his application after notice to and a hearing of creditors and probably also the other party to the contract.

"In deciding whether or not a contract should be assumed the prospective benefit to the estate is an important, if not the decisive, consideration. But it should not be overlooked that normally such assumption entails the assumption of liabilities and in this connection it should be carefully considered whether or not the estate, either due to the assumption of the contract or possibly with the help of other available funds, is financially in a position to accept liabilities as a first charge on the estate."

4 Collier on Bankruptcy, pp. 1357-1359.

By the foregoing standards, obviously, appellee could not have validly assumed contracts in this case regardless of his intention, since he received no permission from the court to do so. The treatise's view is supported by *In re Philadelphia Penn Worsted Company,* 278 F. 2d 661 (C. A. 3, 1960), where, although a receiver had sought leave to assume an executory contract, no order was entered by the Referee. In finding no assumption, the opinion stated at page 665:

"The bankruptcy court's approval of the petition was essential in order to constitute a valid assumption of appellants' contract."

In re Forgee Metal Products, 229 F. 2d 799 (C. A. 3, 1956), cited by appellant, actually supports the above quotation from Collier. In that case, it was the trustee who contended he had adopted a contract within the period prescribed by Section 70b. Upholding this

argument, the Third Circuit pointed out that the assumption had been specifically approved "by order of the bankruptcy court which had the final determining authority of whether the contract should be so assumed." 229 F. 2d at 802.

Similarly, in *In re Swindle,* 188 F. Supp. 601 (D. Ore., 1960), which appellant refers to, the court expressly authorized the assumption of the contract.

See, also, *In re Public Ledger,* 63 F. Supp. 1008, 1015-1016 (E.D. Pa., 1945), rev'd on other grounds, 161 F. 2d 762; and *In re Schenectady Ry. Co.,* 93 F. Supp. 67, 69 (N.D. N.Y., 1950), discussed below in this Brief.

The same rule requiring advance court approval seems to have been applied in equity receivership proceedings before the amendments to the Bankruptcy Act of 1938. *Pacific Western Oil Co. v. McDuffie,* 69 F. 2d 208 (C. A. 9, 1934), *cert. den.* 293 U. S. 568, arose out of the Richfield Oil Company receivership. The question was whether the receiver, by continuing to purchase petroleum products from the appellant under contracts which were pending on the date of the petition, had assumed those contracts in their entirety. As in the present case, the appellant argued that the apparent adoption of the contracts for some purposes necessarily resulted in an assumption of all of the contractual burdens. This Court held that there had been no assumption:

> "It is a general rule that a receiver does not affirm and adopt an existing contract merely by taking possession of the property to which it relates along with other property of the estate; likewise, he

> may, with the approval of the court, perform some part of the contract, experimentally, or pending his election to adopt or reject it, without being or thereby becoming bound by its terms. It is not the rule that the contract is binding on the receiver until renounced. *In order for a receiver to become bound by a contract, he must positively indicate his intention to adopt it; the receiver is not bound until he has affirmed it and assumed its burdens under the direction of the court.*" 69 F. 2d at 213. (Emphasis added.)

Even where specific court authority in advance has not been required, the least the decisions have demanded as a condition of finding an assumption is an unambiguous declaration of the trustee's intent. *In re Luscombe Engineering Company,* 268 F. 2d 683 (C. A. 3, 1959), is the case closest on its facts to the present one. Insofar as is material here, the bankrupt was a subcontractor of Chrysler Corporation in connection with certain work for the United States. To finance its operations, the bankrupt had borrowed from the bank, assigning the monies to become due under the subcontract as security. When bankruptcy occurred, there were on hand certain tools and dies which had been made and used on the Chrysler subcontract and which were to be sold to Chrysler at the conclusion of the job. The trustee delivered these to Chrysler for the same price as called for by the subcontract and "in accordance with" that agreement. The lender asserted that this course of conduct was tantamount to assumption of the contract, and that the trustee was therefore bound to honor the bankrupt's assignment of the monies becoming due.

The Third Circuit rejected the argument and held that the proceeds of the tools and dies belonged to the bankrupt estate. The language of the opinion applies with great force to the present case:

> ". . . for a trustee 'to knowingly conform to the terms of a contract . . . is quite different from its assumption'. In re Schenectady Ry. Co., D.C.N.D.N.Y. 1950, 93 F. Supp. 67, 69. Accord, In re Public Ledger, D.C.E.D. Pa. 1945, 63 F. Supp. 1008, reversed on other grounds, 3 Cir., 1947, 161 F. 2d 762.
>
> "It is to be emphasized that we have here no express or even clearly implied assumption of a bankrupt's contract. The claimant's argument at most suggests ambiguous conduct by trustee and contractor which makes at least as much sense interpreted as a new contract as it does interpreted as an assumption of the old. In such circumstances it becomes significant that Section 70, sub. b of the Bankruptcy Act contemplates, though it may not unvaryingly require, an affirmative statement of assumption if a trustee proposes to assume the bankrupt's contracts. That section also provides explicitly that, absent assumption or rejection, a contract is deemed rejected. We think the sense of this is that rejection is to be inferred unless assumption is satisfactorily proved. Fletcher v. Surprise, 7 Cir., 1950, 180 F. 2d 669. This is in keeping with the recent admonition of this court in In re Forgee Metal Products, 1956, 229 F. 2d 799, 802, stressing the desirability and the importance of clear and express assumption of a bankrupt's contracts by the trustee, if such a course is intended.

> "There is an additional consideration which should make a court reluctant to imply assumption of any of the contracts here, unless the acts of the parties cannot fairly be interpreted any other way. That is the fact that it could be of no advantage to the bankrupt estate for the trustee to assume the old contracts rather than making new bargains for the disposal of the tools and manufactures on hand. . . . Assumption of the old contracts would not be of any greater advantage to Chrysler . . . but it would divert the proceeds from the bankrupt's estate to a particular secured creditor. We should not be eager to utilize any ambiguity in what the parties have said to give their transactions a significance they could not reasonably have intended if they had thought about it." 268 F. 2d at 686-687.

The last paragraph of the foregoing quotation sets forth the rule that assumption of a contract will not be implied—indeed will not be permitted by the court—where the result would be a detriment to the estate. If sustained, however, appellant's contentions and claim do cause such a detriment. For as seen at the outset, the inventory taken into possession by appellee at bankruptcy was free and clear of all liens and secured interests. Any assumption of the bankrupt's contracts which could have the effect of transferring to appellant the proceeds of the sales of the inventory, obviously would mean a loss to the estate in an amount equal to the value of the merchandise involved [Tr. 41]. Under such circumstances especially, assumption cannot be implied from appellee's conduct in this case.

It is also interesting to note that in the *Luscombe* case, as in the present one, the lender had no security interest in the physical assets as distinguished from an assignment of the receivables generated after bankruptcy through sale of those assets. The District Judge, whose decision was affirmed by the Third Circuit, said in this connection:

> "The government and the bank [lender] have sought to place on all these transactions a strained construction in order, in effect, to convert their security interest in the contract proceeds into what would amount to a lien on tangible goods. In this the law and the facts do not support their efforts. . . . The . . . Code . . . provided a convenient method of establishing a lien on the goods more than a year before the bankruptcy. The bank could have taken advantage of its terms, but did not. The courts cannot now do this for these claimants."
>
> *In re Luscombe Engineering Company,* 163 F. Supp. 706, 712 (E.D. Pa., 1958).

Actually, in those situations where a claimant does have a security interest or lien upon assets taken into possession by a trustee, it is unnecessary to analyze the case in terms of assumption of an executory contract. For under such circumstances, the creditor is secured. The trustee must either pay him in full out of the proceeds of the security, or restore the collateral in kind, even though the executory contract is rejected. It was thus superfluous to refer to Section 70b of the Bankruptcy Act in *In re Forgee Metal Products,* 229 F. 2d 799 (C.A. 3, 1956) and *In re McCormick*

Lumber & Mfg. Corporation, 144 F. Supp. 804 (D. Ore., 1956) (liens of conditional sales contracts), and in *In re Swindle,* 188 F. Supp. 601 (D. Ore., 1960) (lien of purchase money mortgage). If appellant here had held a lien upon the bankrupt's inventory, appellee would not question the claim to the monies received from the sales of that merchandise.

Appellant seems to rely principally on *In re Italian Cook Oil Corp.,* 190 F. 2d 994 (C. A. 3, 1951), *In re DeLong Furniture Co.,* 188 Fed. 686 (E.D. Pa., 1911) and *In re Public Ledger,* 161 F. 2d 762 (C. A. 3, 1947), but these are not good authority for its position. In *Italian Cook Oil,* a case arising under Chapter X of the Bankruptcy Act, trustees delivered merchandise in fulfillment of a contract of the debtor, the proceeds of which they knew had been assigned to a bank. The court held that by assuming the contract with the customer under Section 70b of the Act, the trustees also became bound to honor the assignment. The soundness of this conclusion as an original proposition will be considered below in this Brief under Heading C. In any event, however, the decision is distinguishable.

Unlike the present case, it was conceded in *Italian Cook Oil* that the trustees had assumed the debtor's contract. The court stated as a fact—not as a legal conclusion—that "The trustees proceeded to assume the contract. . . ." 190 F. 2d at 996. The question only involved the legal effect of the admitted assumption insofar as the assignment of the proceeds was concerned. Here, on the other hand, appellee denied that he assumed any contracts and the courts below so found as a fact on substantial evidence.

In *Italian Cook Oil,* moreover, the trustees knew of the assignment to the bank at all material times; indeed, there was some indication that the trustees intended to assume the assignment agreement as well as the contract itself, since they appear to have recognized the assignee at first by sending to it the relevant bill of lading and shipping documents.

But to whatever extent *Italian Cook Oil* might suggest that a trustee can assume an executory contract by performance under it, without an actual intention to do so, the case is inconsistent with, and accordingly superseded by, the later decision of the same court in *In re Luscombe Engineering Company, supra.* There, as has been seen, the Third Circuit in finding no adoption, observed that "for a trustee 'to knowingly conform to the terms of a contract . . . is quite different from its assumption'." 268 F. 2d at 686. Significantly, the *Luscombe* opinion did not refer to nor cite *Italian Cook Oil,* a circumstance which permits the inference that the earlier decision has little value as precedent.

Finally, *Italian Cook Oil* was demonstrably incorrect in its basic premise that Section 70b of the Bankruptcy Act had any applicability at all. The case arose under Chapter X, and the section in question does not apply to corporate reorganizations because of other conflicting provisions of the Act.

Title Insurance & Guaranty Co. v. Hart, 160 F. 2d 961 (C. A. 9, 1947), *cert. den.,* 332 U. S. 761;

6 Collier on Bankruptcy, p. 689, n. 49.

In re DeLong Furniture Co., 188 Fed. 686 (E.D. Pa., 1911), also is inapposite here. While the opinion is so cryptic that the facts of the case cannot be determined, it is clear that the trustee there, as in *In re Italian Cook Oil Corp., supra.,* admitted the assumption of the contract. The issue related only to the effect of the assumption on the previous assignment of the proceeds.

Although *In re Public Ledger,* 161 F. 2d 762 (C. A. 3, 1947), contains some language favorable to appellant's present position, the case seems to have been overruled insofar as it is here in point. At least, it is irreconcilable with the subsequent *Luscombe* decision of the Third Circuit. The heart of the *Public Ledger* case from appellant's standpoint is the statement in the opinion that:

> "it makes little difference . . . whether the trustees expressly assumed the contract or merely knowingly conformed to its terms." 161 F. 2d at 767.

But twelve years later in the *Luscombe* case, as quoted above, the same court clearly held that a knowing conformity to the contract is *not* tantamount to its assumption. In so holding, moreover, the decision cited the District Judge's ruling in *In re Public Ledger,* 63 F. Supp. 1008 (E.D. Pa., 1945), noting that it had been "reversed on other grounds." The lower court's opinion which was thus approved had stated:

> ". . . even had the Trustees adopted the . . . contract, it would have been invalid because it

> lacked an order of the court authorizing the same." 63 F. Supp. at 1016.

Similarly cited by the Third Circuit as authority in its *Luscombe* decision was *In re Schenectady Ry. Co.,* 93 F. Supp. 67 (N.D.N.Y., 1950). In that case, a District Court had held that there was no assumption of a labor contract by a Chapter X trustee, saying:

> ". . . the Trustee could not make such obligation his own which might seriously encumber the assets without the consent and approval of the Court." 93 F. Supp. at 69.

It seems plain, therefore, that appellant can derive no comfort from the decision of the Court of Appeals in *In re Public Ledger.* For further criticism of the case, see 4 Collier on Bankruptcy, pp. 1358-1359, nn. 30b, 30c, 30d.

Finally, appellant's reliance on *In re Tidy House Products Co.,* 79 F. Supp. 674 (S.D. Iowa, 1948), is misplaced. The case involved a bankrupt which had acquired certain rights in a trade name and trade mark under a contract calling for royalty payments. The trustee was denied permission to transfer the contract rights free of the obligation to pay royalties. It was held merely that if the trustee desired to assume the contract's benefits, so that he could sell them for the estate, he must also assume its burdens.

C. Even if Appellee Assumed the Bankrupt's Executory Contracts With Its Customers, He Did Not Assume the Contracts by Which the Receivables Were Assigned to Appellant.

Appellee submits that even if he had intentionally assumed the bankrupt's contracts with its customers, it does not follow that he also assumed the agreements which assigned the proceeds to appellant. The notion that a trustee adopts a contract "cum onere" is an oversimplification as appellant attempts to apply it. The fallacy is in the premise that the assignment is a burden of the original contract, when, to the contrary, the assignment is itself a separate contract.

In other words, appellant errs by failing to recognize the fact that the transaction in the present case involves not merely two parties; rather it is three-cornered. In the contract which appellee is said to have assumed, the subject matter and the parties differ from the contract upon which appellant must truly rely. The former involved the bankrupt and its customer, and related to the sale and purchase of inventory. The latter involved the bankrupt and appellant, and related to the transfer of the account receivable to arise from the sale to the customer. Nothing in Section 70b of the Bankruptcy Act compels the conclusion that the trustee must assume the second contract if he assumes the first, and there is no good reason to read such a requirement into the statute. If it is beneficial for the estate to adopt the contract with the customer, why should this benefit be sacrificed by requiring the trustee also to adopt the other contract?

In the ordinary two-party relationship, a trustee could not fairly be permitted to enforce an agreement without accepting its burdens. As applied here, this rule means that the trustee cannot require the customer to pay unless the trustee also delivers the inventory called for by the job order; *i.e.,* the trustee cannot demand payment, yet relegate the customer to a claim as an unsecured creditor for damages for breach of contract. But in a three-cornered situation, there is no comparable unfairness in allowing adoption of only one of the contracts. The trustee does not claim any benefits under the bankrupt's contract with appellant, and thus should not be compelled to undertake its burdens. He might achieve indirectly the same result for which he here contends directly, merely by proclaiming formally the rejection of all executory contracts, and then rewriting the same agreements with the customers. It would be unfortunate to require such formalism under Section 70b.

The foregoing analysis has special force on the facts of the present case. At the time appellee filled the purchase orders in question, he was unaware of the assignments to appellant. Indeed, it was not until during the litigation below that appellant asserted its blanket assignment and claimed the proceeds of deliveries of inventory after bankruptcy.[5] Thus appellee could not

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[5]The pleading upon which appellant proceeded below was its "Second Amended Petition in Reclamation" [Tr. 20-28]. However, as late as its original "Petition in Reclamation," reproduced in material part as an Appendix to this Brief, appellant claimed only receivables generated by deliveries made by

have actually intended to assume the assignment agreements even if he had intended to assume the contracts with the customers. And the same inability would have existed even if the trustee had sought court authority to adopt executory contracts.

Almost all of the decisions cited by appellant and referred to in the preceding portion of this Brief concerned simple, two-party relationships, or cases where the claimant was a secured creditor. Thus, they are inapplicable here. But, concededly, *In re Italian Cook Oil Corp., supra,* and *In re DeLong Furniture Co., supra,* did involve assignees' claims to benefits resulting from the assumption of executory contracts. As has been seen above, however, the continued vitality of these decisions as precedents is doubtful in light of the more recent holding of the Third Circuit in the *Luscombe* case. In any event, it is submitted that they are unsound on principle and should have no persuasive effect on this appeal, since the courts there completely failed to consider the implications of the three-cornered relationship.

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the bankrupt before bankruptcy. All invoices dated after November 1, 1960, the date of bankruptcy, were conceded by appellant to the trustee. Indeed, the three Litton Industries, Inc. invoices, now sought by appellant (see, *e.g.,* Op. Br. p. 16), were specifically admitted to belong to appellee in the original "Petition in Reclamation."

Appellant suggests that appellee knew of the assignments early in this proceeding by taking a sentence in the receiver's first operating report out of context (Op. Br. p. 4). The dispute over appellee's receivables referred to in the report concerned situations where customers made payments without designating clearly whether they pertained to pre-bankruptcy or post-bankruptcy invoices [R. p. 32]. The exhibit attached to the report in question clearly shows that the receiver did not believe that any accounts arising after November 1, 1960 were assigned [Tr. 9].

Conclusion.

For the foregoing reasons, the Order of the Honorable Harry C. Westover, United States District Judge, dated March 5, 1963, should be affirmed.

Respectfully submitted,

QUITTNER, STUTMAN, TREISTER & GLATT,
By GEORGE M. TREISTER,
Attorneys for Appellee.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

GEORGE M. TREISTER

APPENDIX.

Appellant's original Petition in Reclamation is reprinted below in full, with the following exceptions:

> The verification is omitted, as are Exhibits A, B and C. The omitted exhibits are the same as those attached to, and similarly designated, in the Second Amended Petition in Reclamation [Tr. 26-28].

Petition in Reclamation.

United States District Court, Southern District of California, Central Division.

In the Matter of Conair, Inc., a California Corporation, Bankrupt. In Bankruptcy No. 117107-HW

To the Honorable Ray H. Kinnison, Referee in Bankruptcy:

The Petition of Bank of America National Trust and Savings Association, hereinafter referred to as "Petitioner", respectfully represents:

1.

That on or about November 1, 1960, Conair, Inc., a California corporation, filed a petition under Section 322 of Chapter XI of the Bankruptcy Act in the United States District Court, Southern District of California, Central Division, under the Act of Congress relating to bankruptcy.

2.

Subsequent thereto a petition for adjudication in bankruptcy was filed and the court duly appointed James A. A. Smith as Trustee in Bankruptcy for the estate of said bankrupt and said James A. A. Smith

is now qualified and is acting as such Trustee in Bankruptcy.

3.

Prior to the time of filing the said bankruptcy petition herein by bankrupt, said bankrupt on or about July 22, 1960, executed and delivered to Petitioner herein a promissory note in the amount of $109,000.00. That subsequent thereto the amount of $40,000.00 was paid off and received against that principal amount. That on September 21, 1960, said bankrupt executed and delivered a Notice of an Assignment of Accounts Receivable to the Petitioner. That said Notice of Assignment was filed with the County Recorder, County of Los Angeles, State of California, on September 22, 1960, and that bankrupt executed and delivered to Petitioner a renewal note in the amount of $69,000.00 dated September 28, 1960. A true and correct copy of said promissory note, Notice of Assignment of Account or Accounts, and Recorder's certificate of said Assignment of Accounts Receivable is attached hereto, marked Exhibits A, B and C respectively, and incorporated herein by reference. That on the dates set forth in Column 1 of Exhibit D, the bankrupt executed and delivered to Petitioner certain assignments of Accounts Receivable owed or to become owing by the entity named in Column 2 of Exhibit D. That subsequently but prior to November 1, 1960, goods manufactured by bankrupt were sold to the entities under numbered invoices as set forth in Column 3, with an invoice amount as listed in Column 4. That the net amount received from the named entities is listed in Column 5. That the total amounts received respectively by the Petitioner justly due to the Trustee and by the Trustee justly due the Petitioner are set forth in

Column 6 indicating the net difference owing to the Petitioner by the Trustee of $19,519.16. That attached to said Exhibit D are copies of the "Assignment of Monies" duly executed by said bankrupt in favor of Petitioner relating to the entities and amounts as set forth in Exhibit D.

4.

Subsequent to September 28, 1960, and prior to January 1, 1961, certain payments under said Assignment of Accounts Receivable were received by Petitioner resulting in the balance on the aforementioned renewal note, being reduced to $26,494.28, which sum is now due and owing to Petitioner. Subsequent to the appointment of James A. A. Smith as Trustee in Bankruptcy certain accounts receivable have been collected and received directly by said Trustee, the total amount being $26,730.20. That amount represents accounts receivable which were assigned to Petitioner and are properly due to Petitioner. In addition, Petitioner has collected certain sums representing accounts receivable for work done subsequent to November 1, 1960, and by agreement are properly due James A. A. Smith, Trustee in Bankruptcy. Consequently, James A. A. Smith presently holds for the estate a total of $19,519.16 net, which amount belongs to and is properly the property of said Petitioner.

5.

The Trustee in Bankruptcy, James A. A. Smith, by a letter dated December 29, 1960, advised Petitioner that in accordance with a prior understanding between Trustee and Petitioner, the Trustee requested that Petitioner make an audit of the accounts receivable, which are the subject of this Petition, and further stated that

he (Trustee) would furnish Petitioner a check in full for all accounts and monies held in trust for Petitioner in exchange for Petitioner's check for the accounts being held by Petitioner. Subsequently, by a letter dated January 16, 1961, Petitioner advised Trustee that an audit had been taken and that the result of that audit was that the Trustee had collected sums totalling $26,730.20 of accounts receivable which were assigned to Petitioner and that Petitioner had collected the sum of $7,211.04 which should be paid over to the Trustee. Petitioner by that letter requested that the net amount of $19,519.16 be forwarded to Petitioner. Petitioner has as yet received no reply to that request.

Wherefore, you [sic] Petitioner Bank of America National Trust and Savings Association prays that an order be made herein declaring that the amount of $19,519.16 is properly due the Petitioner, that said bankrupt's estate has no interest in that amount and that said Trustee be ordered to forthwith pay over to Petitioner the sum of $19,519.16.

Bank of America National Trust
and Savings Association

By L. W. Enders
Assistant Cashier

Hugo A. Steinmeyer, Robert H. Fabian
and Harris B. Taylor

By Harris B. Taylor
Attorneys for Petitioner
Bank of America National Trust
and Savings Association

Col. 1 Date	Col. 2 Payor-Entity	Col. 3 Invoice Number	Col. 3 Date	Col. 4 Invoice Amount	Col. 5 Net Amount Received	Col. 6 Net Difference
Sept. 26, 1960	Ryan Aeronautical	2641	9/23/60	$5,685.00		
		2643	9/23/60	2,751.00		
		2648	9/28/60	109.69		
		2664	9/30/60	4,070.77		
		2665	9/30/60	107.00		
		2666	9/30/60	5.00		
		DM5301	10/7/60	(682.50)		
		DM5324	10/17/60	(804.00)		
		DM5320	10/17/60	(39.00)		
		DM5323	10/17/60	(854.40)		
					$10,245.08	
Sept. 26, 1960	Convair	2705	10/14/60	1,427.44		
	Fort Worth, Texas	2730	10/24/60	1,168.01		
		2734	10/24/60	1,494.71		
					$ 4,075.90	
Sept. 26, 1960	Litton Industries	2745	10/27/60	50.00		
		2746	10/27/60	1,850.00		
		2747	10/27/60	67.06		
		2760	10/31/60	164.50		
					$ 2,131.56	
Sept. 26, 1960	Crescent-Sargent Corp.	2716	10/19/60	5,670.00	$ 5,670.00	
Sept. 26, 1960	Bell Helicopter Co.	2758	10/31/60	2,920.00	$ 2,920.00	
Sept. 26, 1960	Fort Worth General Depot	2720	10/31/60	10.61	$ 10.61	
Sept. 26, 1960	Helicopter Aircraft	2749	10/27/60	4.41	$ 4.41	
Sept. 26, 1960	Parker Aircraft Co.	2939	9/23/60	$ 385.00		
		2668	9/30/60	$ 105.40		
		2681	10/6/60	$ 124.00		
		2735	10/25/60	$ 107.00	$ 721.40	

EXHIBIT D

Col. 1 Date	Col. 2 Payor-Entity	Col. 3 Invoice Number	Col. 3 Date	Col. 4 Invoice Amount	Col. 5 Net Amount Received	Col. 6 Net Difference
Sept. 26, 1960	Monogram Precision	2647	9/28/60	$ 190.00	$ 190.00	
Sept. 26, 1960	Telecomputing Corp.	2660	9/30/60	$ 43.50		
		2667	9/30/60	$ 146.00		
		2757	10/31/60	$ 571.00	$ 760.50	
Sept. 26, 1960	Petroleum Helicopters	2702	10/14/60	$ 0.74	$ 0.74	
TOTAL AMOUNT HELD BY TRUSTEE DUE BANK						$26,730.20
Sept. 26, 1960	Ryan Aeronautical Co.	42761	11/2/60	$ 480.60		
		(502)		($47.10)		
		42792	11/15/60	$ 84.50		
		42793	11/15/60	$ 373.15		
		42794	11/15/60	$ 62.00	$ 943.61	
Sept. 26, 1960	Telecomputing Corp.	42795	11/15/60	$ 353.77	$ 350.23	
Sept. 26, 1960	Aerojet General Corp.	42770	11/8/60	$ 335.40		
		(55157)		($12.90)		
		42796	11/15/60	$ 60.25	$ 382.50	
Sept. 26, 1960	Chicago Helicopter Airways Inc.	42798	11/16/60	$ 25.72	$ 25.72	
Sept. 26, 1960	Litton Industries	42763	11/4/60	$5,700.00	$ 1,975.05	
		42779	11/10/60	$5,700.00	$ 3,385.80	
		42788	11/14/60	$ 166.25	$ 148.13	
TOTAL HELD BY BANK DUE TRUSTEE						$ 7,211.04
NET AMOUNT HELD BY TRUSTEE DUE BANK AS ASSIGNEE						$19,519.16

EXHIBIT D

No. 18729

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION,

Appellant,

vs.

JAMES A. A. SMITH, etc.,

Appellee.

APPELLANT'S CLOSING BRIEF.

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TOPICAL INDEX

TABLE OF AUTHORITIES CITED

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Appellee.

APPELLANT'S CLOSING BRIEF.

ARGUMENT.

I.

The Uncontradicted Facts Are That Appellee Assumed and Performed the Executory Contracts.

The operation of the business of Conair by appellee, both as Receiver and Trustee, pursuant to the orders of the Bankruptcy Court, was in all respects a mere continuation of the business that did not interrupt the prior practices of Conair in respect to the delivery of the products under the job purchase orders that were on hand when appellee took over. These job purchase orders that called for the delivery of products had been delivered to Conair prior to the assumption of duty by appellee as Receiver and each one was an order for the delivery of specific products under a basic contract [Tr. 30]. Contrary to what appellee asserts in his

brief (Br. p. 4), it was not the basic contracts that had been assigned to appellant but rather "all monies now due or which may hereafter become due to the assignor [Conair] from" Conair's named customers. These assignments had been effectuated prior to any bankruptcy proceeding and between the dates of September 22, 1960 and November 1, 1960 [Tr. 30].

Each executory contract that was assumed and performed by appellee under which appellant is entitled to receive payment on its assignments was a job purchase order as one of a series of contracts under the applicable basic contract [Tr. 30 and 34] and not as appellee argues (Br. p. 12) merely the basic contract. There would have been no contract to invoice and collect the account receivable upon if there had been no job purchase order.

Appellee states (Br. p. 4) that he did not know about the assignments from Conair to appellant, but, as stated further by appellee (Br. p. 4), the "Notice of Assignment of An Account Or Accounts" was duly filed on September 22, 1960 under Sections 3017, *et seq.* of the California Civil Code. Therefore, despite what appellee argues, the assignments were a matter of public record concerning which appellee is deemed to have had notice.

Appellee's statement that he did not intend to assume any of the bankrupt's executory contracts but that he only filled job orders to liquidate the assets (Br. p. 4) is merely his self-serving conclusion that is not supported by the acts that he performed as evidenced by the stipulations and his own testimony.

The delivery of the products, invoicing, and creation of the accounts receivable under the job purchase orders

was handled in all respects as it had been before the Chapter XI was filed by Conair, and appellee told Feland, who continued to operate the business under the directions of appellee, as follows [R. 41]:

> "I told him if they needed to, to go ahead and sell it or if these contracts were still good and they would accept them, to go ahead and convert the material and work in process on hand to completed merchandise to deliver."

II.

The Authorities Referred to and Interpreted by Appellee Do Not Hold That the Assumption of the Executory Contracts by Appellee Required an Express Order of the Bankruptcy Court for Enforceability.

There was at least tacit approval of the Bankruptcy Court for the assumption of the executory contracts by the Order of November 2, 1960 which authorized appellee as Receiver "to continue and carry on with the business as conducted by the said Debtor until further order of this Court" [Tr. 3]. Also the further order of the Bankruptcy Court authorized the appellee as Trustee to continue the current operation of the business of Conair [Tr. 16].

Section 70b of the Bankruptcy Act specifies that "* * * the *Trustee* shall assume or reject any executory contract * * *" [emphasis added] and it does not specify that the assumption shall first be approved by the court. Section 70b of the Bankruptcy Act in respect to other matters specifically requires approval of the court.

Appellee refers to 4 *Collier on Bankruptcy,* pp. 1357-1359 (Br. pp. 13-14) but that quotation does not sup-

port the proposition that an assumption without the express approval of the Bankruptcy Court is invalid. That author of the treatise merely concludes that the "*proper procedure*" is for the Trustee to apply to the court and it further states that the court "*should*" pass upon his application.

The case of *In re Philadelphia Penn Worsted Company,* 278 F. 2d 661 (C. A. 3, 1960), cited by appellee (Br. p. 14), does not hold that Bankruptcy Court approval was essential for the valid assumption of the contract because the court said (p. 664) that the Receiver's agreement for the sale of the land was merely an executory contract under the law of Pennsylvania and that it was, therefore, properly rejected by the newly appointed Trustee.

The case of *In re Forgee Metal Products,* 229 F. 2d 799 (C. A. 3, 1956), referred to by appellee (Br. pp. 14-15), was not a case in which there was an express order directing the Trustee to specifically assume the contract. The court said (p. 802) that there was an "in effect assumption of the contract". The court in the *Forgee* case did not think that the Trustee had followed the correct procedure but upheld the assumption of the contract, and the court said (p. 802):

> "Therefore we stress the necessity of receivers and trustees adhering strictly to the provisions of the Bankruptcy Act and the obligation of the referees to see to it that they do."

Appellee (Br. p. 15) misconstrues the holding in the case of *In re Public Ledger,* 161 F. 2d 762 (C. A. 3, 1947), because the District Court decision, 63 F. Supp. 1008 (E. D. Penn. 1945), was reversed on the basis

that the conduct of the Trustees amounted to an assumption of the executory contracts and the lower court had determined to the contrary.

In the case of *In re Schenectady Ry. Co.,* 93 F. Supp. 67 (N. D. N. Y., 1950), referred to by appellee (Br. pp. 15 and 23), the court said (p. 70):

> "No judicial decision is cited which might be termed a precedent in this case and it would seem that the determination of the question would depend upon the particular facts involved."

The further case of *Pacific Western Oil Co. v. McDuffie,* 69 F. 2d 208 (C. A. 9, 1934), cited by appellee (Br. pp. 15-16), supports the proposition that there may be an assumption of an executory contract by conduct but in that particular case the court held that the conduct was such as not to constitute an assumption. The court said, (p. 213):

> "What, then, are the implications which inhere in the situation? The receiver immediately advised the directors of appellant that for the oil delivered prior to the receivership he would require appellant to file a general claim—upon no other condition would he continue dealing with appellant."

The court further said in that case (p. 213):

> "Adoption may be signified either by express agreement or by implication."

The case of *In re Luscombe Engineering Co.,* 268 F. 2d 683 (C. A. 3, 1959), referred to by appellee (Br. pp. 16-19), was not a case where the court decided that there had been no assumption of executory contracts by the Trustee because there had been no order relating to that by the Bankruptcy Court, but this

was a case where the court discussed the acts of the Trustee and decided that they did not constitute an assumption of the executory contracts. The court, concerning the Philco part of the matter, said (p. 685):

> "We attribute decisive importance to the fact that, as concerned future performance, Philco had elected to terminate its contract with the bankrupt because of Luscombe's defaults before the trustee took any action with reference to the subject matter."

The court in the *Luscombe* case, *supra,* concerning the Chrysler contract said (p. 686):

> "* * * the trustee never undertook to complete the contract, it was agreed during the bankruptcy that the trustee would surrender the tools and dies and that Chrysler would pay him forthwith the total unpaid balance of the cost of these articles, a sum which would have been payable in instalments under the original contract."

The case of *In re Italian Cook Oil Corp.,* 190 F. 2d 994 (C. A. 3, 1951), referred to by appellee (Br. pp. 20-21), was a case where the court found from the conduct of the trustees that there was an assumption of an executory contract. There was no order of the Bankruptcy Court providing for that assumption by the trustees. The theory of the court that a valid assumption of an executory contract could be effectuated by the trustees without an order of the Bankruptcy Court is unaffected by the fact that the bankruptcy proceeding was under Chapter X of the Bankruptcy Act.

Two cases referred to by appellee (Br. pp. 15 and 20-22): *In re Swindle,* 188 F. Supp. 601 (D. Ore., 1960), and *In re DeLong Furniture Co.,* 188 F. 2d 686 (E. D. Penn., 1911), were cited by appellant (Op. Br. pp. 12-13) merely for the proposition that the trustees by the adoption of the executory contracts thereby became liable for the burdens of them; the burden in the instant case is to have appellant collect on its assignments.

III.

The Litton Industries, Inc. Executory Contracts Were Assumed and Performed by Appellee as Receiver and Section 313(1), Chapter XI, of the Bankruptcy Act Applies.

Appellee operated as Receiver of Conair from November 2, 1960 until he was appointed Trustee on January 4, 1961 [Tr. 2-3 and R. 19]. The three invoices on the Litton Industries, Inc. accounts receivable are dated respectively November 4, 10 and 14, 1960 [Tr. 31-32]. The invoices were dated concurrently with the delivery of the products [Tr. 30]. Section 313(1) of the Bankruptcy Act provides in part that the Bankruptcy Court may "(1) permit the rejection of executory contracts of the debtor, upon notice to the parties to such contracts and to such other parties in interest as the court may designate."

There was no order of the Bankruptcy Court permitting appellee as Receiver to reject the executory contracts with Litton Industries, Inc. It would follow that since the contracts with Litton Industries, Inc.

could not have been rejected, and were fully performed under appellee's receivership administration, they were therefore assumed by appellee. Appellee's brief says that executory contracts in Chapter XI proceedings may be rejected at any time before confirmation of the plan and that the plan itself may provide for rejection (Br. p. 11). Appellee's references, however, are not pertinent to the present case and, furthermore, 8 *Collier on Bankruptcy* (14th Ed.) pp. 229-230 says:

> "Where an arrangement provides for the rejection of an executory contract, the rejection itself is not effective unless and until the arrangement is confirmed * * *."

Further 8 *Collier on Bankruptcy* (14th Ed.) p. 227 says:

> "Whether the debtor is in possession, or whether there is a receiver or trustee, the contract can be rejected only by affirmative action under §313(1) or §357(2). Unless so rejected, the contract continues in effect."

The Litton Industries, Inc. transactions took place during the Chapter XI proceedings and were handled in all respects as they would have been by Conair before the Chapter XI proceeding.

Appellant is entitled to retain the sum of $11,450.59 that it has collected on the Litton Industries, Inc. accounts receivable. This sum of $11,450.59 is part of the sum of $21,554.66 that the appellant has collected on accounts receivable that the Bankruptcy Court and District Court have erroneously ordered appellant to pay over to appellee.

IV.

The Appellee by Adoption of the Executory Contracts Became Liable to the Appellant on Its Assignments.

Appellee argues (Br. 24-26) that even if he did adopt Conair's executory contracts he is not liable to appellant on its assignments. Appellee does not cite any authority for his argument and the cases cited in Appellant's Opening Brief on that point hold to the contrary. Furthermore, 4 *Collier on Bankruptcy* (14th Ed.) pp. 1361-1362 says:

> "The trustee's assumption of an executory contract operates as a complete transfer of all the bankrupt's contractual rights and contractual liabilities therein. The transfer is not cumulative in effect—that is, the trustee is not added to the bankrupt as another debtor, jointly or severally liable with the bankrupt. It involves a complete elimination of the bankrupt, his discharge from his contractual relations, and his replacement by the trustee."

Appellee also refers (Br. pp. 25-26; to appellant's original, superseded Petition in Reclamation that is not a part of the record on appeal in this case but which appellee reproduces in part in the appendix to his brief. The original Petition in Reclamation was superseded by the Second Amended Petition in Reclamation [Tr. 20-28]. Appellee did not file any answer to the Second Amended Petition in Reclamation and he is not now in a position to contend that appellant waived any of its rights by anything contained in the original Petition in Reclamation. Appellee stipulated in writing and the Bankruptcy Court, by its Order of May 29, 1962, authorized appellant to file its Second Amended Peti-

tion in Reclamation and it was further provided in the stipulation and Order that appellee should have ten days to answer or otherwise respond thereto [Tr. 18-19]. Also it is not true that appellant admitted in its original Petition in Reclamation that all of the Litton Industries, Inc. sums belonged to appellee, as stated by appellee (Br. p. 26).

V.
Conclusion.

Appellee performed the executory contracts that were on hand at Conair when he took over his administration of duties as an officer of the Bankruptcy Court. The Appellee's performance of the executory contracts was in all respects the same as if Conair had performed them without the intervention of any bankruptcy proceeding. It was conceded by appellee that the inventory would have been valueless except for his performance of these executory contracts [R. 16-17]. It does not follow, therefore, as argued by appellee (Br. p. 18), that there was any loss to the bankruptcy estate in an amount equal to the value of the merchandise involved, because that merchandise without performance of the executory contracts was valueless. The appellee is in possession of the total sum of $55,301.35 that he has collected from customers of the bankrupt on accounts receivable that had been assigned by Conair to appellant [Tr. 34]. Since appellee has possession of this amount of money, at least, from his operation of the business of Conair, it can hardly be correctly contended by him

that his operation and assumption of the executory contracts constitutes in any way a losing proposition to the bankruptcy estate. The Court herein should permit appellant to retain the sum of $11,450.59 on the Litton Industries, Inc. accounts receivable and receive a sufficient additional amount from the sum of $55,301.35 held by appellee to pay the Bank the balance of its promissory note which now has a principal balance of $24,654.68, plus interest.

Respectfully Submitted,

SAMUEL B. STEWART,
ROBERT H. FABIAN and
HARRIS B. TAYLOR,
Attorneys for Appellant Bank of America National Trust and Savings Association.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

HARRIS B. TAYLOR